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Honor and Destruction: The Conflicted Object in Moral Rights Law

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HONOR AND DESTRUCTION: THE CONFLICTED OBJECT IN MORAL RIGHTS LAW

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INTRODUCTION

“We are interested in protecting the work of art for public reasons, and the moral right of the artist is in part a method of providing for private enforcement of this public interest.”¹

In 1990, the Copyright Act was amended to name visual artists, alone among protected authors, possessors of “moral rights,”² a set of non-economic intellectual property rights originating in nineteenth-century Europe. Although enhancing authors’ rights in a user-oriented system was a novel undertaking,³ it was rendered further anomalous by the statute’s designated class, given copyright’s longstanding alliance with text.⁴ And although moral rights epitomize the legacy of the Romantic author as a cultural trope embedded in the law, American culture offered little to support or explain the apparent privileging of visual artists over other authors.⁵ What, if not a

¹ John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976).

² See Visual Artists Rights Act of 1990 § 603 (codified at 17 U.S.C. § 106A (2006)).

³ The presence or absence of moral rights in copyright law has historically marked the divide between author-oriented civil law countries and user-oriented common law countries, but that line has blurred in recent years with common law countries increasingly adopting a version of moral rights. See, e.g., *Copyright Act 1968* (Cth) pt 9 (Austl.); *Copyright Act 1994*, pt 4 (N.Z.); *Copyright, Designs and Patents Act, 1988*, c. 48, §§ 77–89 (U.K.).

⁴ See Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 685 (2012) (noting that the words, “the prototypical subject matter of copyright,” have dominated the law’s development).

⁵ See Charlotte Burns, “Artists Are Seen as One Step Above Criminals”, ART NEWSPAPER, Oct. 1, 2011, <http://www.theartnewspaper.com/articles/Artists-are->

legal or cultural disposition toward visual artists, precipitated the enactment of a moral rights statute like the Visual Artists Rights Act of 1990 (“VARA”)? This Article demonstrates that the answer is less related to authorship concerns than would reasonably be surmised from a doctrine premised on the theory that a creative work embodies the author’s honor, personhood, and even soul.⁶

The question, and its revealing answer, has been obscured by the more obvious issue of VARA’s ineffectiveness. VARA, an emphatically contained statute,⁷ has generated a remarkably disproportionate degree of scholarly interest, most of which reflects a desire to expand its reach and scope.⁸ However, commentators usually discuss VARA’s limitations within the confines of serving visual artists and works of art, not other types

seen-as-one-step-above-ciminals/24654 (quoting artist Paul McCarthy in title, who was referring to American culture); Carol Becker, *The Artist as Public Intellectual*, in *THE POLITICS OF CULTURE: POLICY PERSPECTIVES FOR INDIVIDUALS, INSTITUTIONS, AND COMMUNITIES* 236, 239 (Gigi Bradford et al. eds., 2000) (discussing societal mistrust of artists and stereotype as “somewhat irresponsible, less than adult”).

⁶ The term “moral right” resulted from a direct translation of the French term *droit moral*; however, the rights are more accurately described as authorial rights of personality, as in the German term *urheberpersönlichkeitsrecht*. Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 *CARDOZO ARTS & ENT. L.J.* 37, 68 (2009).

⁷ See ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 47 (2010) (describing U.S. system as more minimalistic than either civil or common law regimes).

⁸ The sheer number of VARA articles is often remarked upon. See, e.g., Susan P. Liemer, *How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright*, 5 *J. MARSHALL REV. INTELL. PROP. L.* 1, 6 n.39 (2005) (contrasting artists’ lack of success in court with amount of VARA scholarship generated); Christopher J. Robinson, Note, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1939 n.22 (2000) (“Moral rights, not surprisingly, are a favorite of academics, and articles on the subject far outnumber the cases in which moral rights are invoked.”); *Law Students Crazy Over Visual Artists Rights Act*, CLANCCO (June 1, 2010, 5:29 PM), <http://clancco.com/wp/2010/06/law-students-crazy-over-visual-artists-rights-act>.

of authors.⁹ In other words, the moral rights doctrine in the United States is typically perceived as a branch of “artists’ rights.”¹⁰

This Article argues that VARA did not merely allocate moral rights to a circumscribed group of authors, but repurposed them. VARA’s conceptual underpinnings, while glossed with Romantic rhetoric, were primarily informed by a different subject, the unique art object. Thus, to argue that VARA does not adequately protect artists overlooks its more basic purpose: a “method”—to borrow from the quote above—of serving the presumed public interest in art preservation.

VARA was conceptualized foremost as a statute honoring unique, valuable objects of art; the artist was secondary. This inverted balance of the very connection between creator and created that traditional moral rights law enshrines, however slight, has powerfully shaped the law’s doctrinal landscape in the United States. Although VARA assumes the Romantic author as a vital premise, it ultimately regulates objects—the consumption of art rather than its production—acting as a tiny virtual museum whose hermetic confines are always in tension with the sweep of its ascribed cultural role. Despite the voluminous

⁹ See, e.g., Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 408 (2009) (“Scholarly research has lamented the weakness of U.S. protection for artists”); Peter H. Karlen, *What’s Wrong with VARA: A Critique of Federal Moral Rights*, 15 HASTINGS COMM. & ENT. L.J. 905, 906 (1993); Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 298 n.5, 303 (2003); Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 364 (1998); Jill R. Applebaum, Comment, *The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral*, 8 AM. U. J. INT’L L. & POL’Y 183, 210–12 (1992); Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 376–78 (1995). One prominent exception appears in Professor Kwall’s proposal for moral rights reform that would encompass a broad class of creative authors. See, e.g., KWALL, *supra* note 7, at 149.

¹⁰ See Susan P. Liemer, *Understanding Artists’ Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 42–43 (1998) (defining moral rights as reflecting the “unique relationship between an artist, the creative process, and the resultant art”). Even critics of the doctrine tend to focus on its implications for artists. See, e.g., Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009); Lindsey A. Mills, Note, *Moral Rights: Well-Intentioned Protection and Its Unintended Consequences*, 90 TEX. L. REV. 443, 444 (2011).

corpus of scholarship critiquing VARA, the specific cultural fissures prompted by its system of realizing moral rights through art preservation remain unaddressed.¹¹

Recently, Amy Adler attacked VARA's premises from the vantage of postmodern "anti-art" theory, positioning the Romantic author and art itself as historical anachronisms.¹² While this Article acknowledges anti-art conceptual tendencies as a crucial component of VARA's cultural misalignment, the analysis here uses a broader epistemology to accommodate a diverse field of expression where no single theory dominates, and in which the author is not as yet dead. However, neither does this Article expand upon the deeply internal process of human creativity charted by Roberta Rosenthal Kwall.¹³ Instead, this Article offers a sociocultural perspective of the moral rights doctrine as it developed in the United States, positioning VARA as both a culmination of particular values and a constitutive force in perpetuating them. Although this Article is not the first to notice that VARA's emphasis falls on the object rather than the artist, the assumptions embedded in this priority and VARA's resulting social ruptures as arts policy, as moral rights doctrine, and as copyright law have not been documented.

Part I offers an overview of traditional moral rights theory, particularly the right of integrity, and outlines relevant strains of law and culture that preceded the enactment of VARA. Part II discusses how VARA functions as a statute that mediates artists' rights through the physical object, and how the deliberate synthesis of preservation theory with orthodox moral rights philosophy hamstrings both ends. Part III identifies cultural assumptions embedded in three prominent attributes of the art object conceptualized as protected under VARA—material, cultural, and transcendent—and discusses their conflicting impulses in the law. Finally, Part IV concludes that the "object model," infused with deterministic theories of modernism and

¹¹ That the statute's problems cannot be traced exclusively to its narrow scope is suggested by its complicated interaction with the art world. See, e.g., Virginia Rutledge, *Institutional Critique: Virginia Rutledge on Christoph Büchel and Mass MoCA*, ARTFORUM, Mar. 1, 2008, at 151, 382 (pointing out, with respect to a case in which an artist and art museum were adversaries, that the issues were less about VARA's scope than the values it reflects).

¹² See Adler, *supra* note 10, at 265, 285.

¹³ E.g., Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1947–48 (2006).

cultural evolution, must be dismantled for moral rights to assume a viable and meaningful role in copyright law. Through this discussion, this Article offers a discursive platform for redirecting the predicate theory of the moral rights doctrine toward a contemporary construct of authorial dignity.

I. MORAL RIGHTS BACKGROUND

This section contrasts moral rights theory in its original European incarnation, a function of philosophical ideas about personhood, with its doctrinal topography in the United States, explicitly rationalized with societal goals. Selected social, political, and art historical developments in twentieth-century America are identified to contextualize VARA's enactment.

A. *Moral Rights Orthodoxy*

Although there is no universal system of moral rights law,¹⁴ the nineteenth-century French *droit moral* established the dominant conceptual paradigm,¹⁵ influenced by the philosophies of Kant and Hegel, that a creative work is not simply an external object but the communication of an author's thoughts, imbued with his personality.¹⁶ Under this construct, moral rights are non-economic, inalienable rights that transcend the economic formalities of sale. They protect the artist who "projects into the world part of his personality and subjects it to the ravages of public use."¹⁷

¹⁴ See, e.g., Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 230 (1995) (noting a lack of consensus among civil law jurisdictions).

¹⁵ See ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS* ¶¶ 1.63–1.64 (2006) (discussing evolution in France through court decisions in mid-nineteenth century). Some argue that the distinction between civil and common law countries is more conceptual than practical. Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 72–73 (2007). *Contra* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 17 (1994).

¹⁶ Netanel, *supra* note 15. Hegel is generally credited with originating the philosophy underlying the "dualist" French system, where copyright law protects an author's economic rights and the *droit moral* protects the personal rights arising from the author's projection of self into the work. *Id.* at 19–21, 23.

¹⁷ Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 557 (1940).

The moral right of integrity,¹⁸ the central focus of this Article, requires the purchaser to respect the work in its original, authentic form. John Merryman illustrated this right in his seminal article that, importantly, used visual art as the primary vehicle for explaining moral rights.¹⁹ In the French case he described, the owner of a painted refrigerator with six panels attempted to sell one panel as if it were a complete work by artist Bernard Buffet. Buffet brought an action to prevent the separate sale of the panel and succeeded.²⁰ As explained by Merryman, “Distortion, dismemberment or misrepresentation of the work mistreats an expression of the artist’s personality, [and] affects his artistic identity, personality, and honor.”²¹

The purpose of the right of integrity is anchored in the artist’s personality. Thus, civil law countries historically have not included a right to prohibit the complete destruction of an art work on the theory that unlike misrepresentation, mere absence cannot harm an artist’s reputation.²² Further, although moral rights are perpetual in France, the rights remain personal to the artist; heirs are presumed to inherit only a right of

¹⁸ The four basic rights typically embraced within the doctrine include: (1) the right of disclosure; (2) the right to withdraw; (3) the right of attribution (to have one’s name or authorship recognized); and (4) the right of integrity of the work of art. See, e.g., Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 203 (1995); Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 467 (1968).

¹⁹ Merryman, *supra* note 1, at 1027.

²⁰ *Id.* at 1023 n.1 (discussing Buffet v. Fersing, Cour d’appel [CA] [regional court of appeal] Paris, 1962, D. Jur. 570, 571 (Fr.)).

²¹ *Id.* at 1027.

²² See KWALL, *supra* note 7, at 44; Roeder, *supra* note 17, at 569 (observing that “even in France,” there was precedent declining to prohibit destruction as a moral right); Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 110 (1997); Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 371 (2006); Marina Santilli, *United States’ Moral Rights Developments in European Perspective*, 1 MARQ. INTELL. PROP. L. REV. 89, 100 (1997) (noting right to prevent destruction “remains quite controversial in Europe”). But see Edward J. Damich, *The New York Artists’ Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1742 (1984) (stating that the French right of integrity includes prohibition of complete destruction).

enforcement.²³ Some jurisdictions, such as Germany, refuse to recognize a perpetual right of integrity because doing so would convert the right into an instrument of cultural preservation.²⁴

B. *Early Conceptions of Moral Rights, American Style*

For many years, the United States resisted joining the international copyright treaty known as the Berne Convention for the Protection of Literary and Artistic Works ("Berne"), founded in 1886, at least partially due to its moral rights provisions.²⁵ Although the American response to Berne has a complex history,²⁶ one prominent feature was unwavering opposition by the motion picture industry and broadcasters due to the adaptation needs found crucial in these industries.²⁷ Lawmakers considered moral rights incompatible with the classic social utility model of copyright law and the corresponding principle of unlimited alienability.²⁸

²³ Dietz, *supra* note 18, at 214.

²⁴ Rigamonti, *supra* note 22, at 370–71.

²⁵ *E.g.*, H.R. REP. NO. 101-514, at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6917 ("[C]onsensus over United States adherence [to the Berne Convention] was slow to develop in large part because of debate over the requirements of Article 6bis."); see also *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 82 (2d Cir. 1995) (noting that protecting moral rights was a "prominent hurdle" in the debate over joining Berne). Article 6bis, the moral rights provision, currently reads:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6bis, 828 U.N.T.S. 223, 235 (amended Sept. 28, 1979).

²⁶ See H.R. 5853, 73d Cong. (1933); S. 3047, 74th Cong. (1935) ("Duffy Bill"); H.R. 10632, 74th Cong. (1936) ("Daly Bill"). See generally Willy Hoffman, *European Legislation and Judicial Decision in the Field of Copyright in 1930*, 8 N.Y.U. L. Q. REV. 369, 369–84 (1931) (discussing the "Vestal Bill"); Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1059 (1968) (noting that United States declined a limited-time offer to adhere to 1908 Berlin text); Steven Wilf, *The Making of the Post-War Paradigm in American Intellectual Property Law*, 31 COLUM. J.L. & ARTS 139, 178–82 (2008).

²⁷ See, e.g., *International Convention of the Copyright Union: Hearings Before the Subcomm. of the S. Comm. on Foreign Relations*, 75th Cong. 20 (1937) (statement of Edwin P. Kilroe, Chairman, Copyright Comm., Motion Picture Producers and Distributors of America).

²⁸ Netanel, *supra* note 15, at 9–13.

This country's first explicit judicial invocation of the moral right of integrity in 1949²⁹ involved the wholesale destruction of art—a large fresco mural in a church that had been painted over at the insistence of the parishioners.³⁰ A New York court rejected the artist's moral rights argument,³¹ but referenced two salient writings in its opinion, both of which addressed destruction.³² The first, a law journal article, described the personality-driven understanding of the integrity right that includes a right to prevent distortion, but not destruction: "To deform [the artist's] work is to present him to the public as the creator of a work not his own, and thus make him subject to criticism for work he has not done; the destruction of his work does not have this result."³³

The other, a landmark treatise on international copyright law by Stephen Ladas, asserted that moral rights should be extended to authors for the destruction of art work because, "[t]he maintenance and preservation of a work of art is invested with the public interest in culture and the development of the arts."³⁴

Both writers contemplated cultural heritage as a strong rationale for adopting moral rights and thus viewed them as perpetual.³⁵ Subsequent academic writings on moral rights continued this entanglement of a public interest in preserving culture and the author's rights of personhood.³⁶ Although

²⁹ The right of attribution was first referenced slightly earlier. See *Vargas v. Esquire, Inc.*, 164 F.2d 522, 523–27 (7th Cir. 1947).

³⁰ *Crimi v. Rutgers Presbyterian Church in N.Y.*, 194 Misc. 570, 571–72, 89 N.Y.S.2d 813, 815 (Sup. Ct. N.Y. Cnty. 1949). In 1938, Alfred Crimi was selected to execute a large fresco mural painting inside a church in Manhattan. Eight years later, the mural was painted over because parishioners objected to his depiction of a bare-chested Christ, claiming that it placed more emphasis on physical attributes than spiritual qualities. *Id.* at 570–72, 89 N.Y.S.2d at 814–15.

³¹ *Id.* at 574, 89 N.Y.S.2d at 817 (noting that the United States was not a signatory to Berne).

³² See Roeder, *supra* note 17, at 569. See generally STEPHEN P. LADAS, 1 THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY (1938).

³³ Roeder, *supra* note 17, at 569.

³⁴ LADAS, *supra* note 32, § 287.

³⁵ Roeder merely saw the public interest as vesting at the artist's death, but not before. See Roeder, *supra* note 17, at 574–75 ("The real reason . . . for protection of the moral right after the creator's death lies in the need of society for protection of the integrity of its cultural heritage."). Ladas saw moral rights as a basis for serving the public interest both during and after the artist's lifetime. LADAS, *supra* note 32, §§ 275, 286.

³⁶ See Sidney A. Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244, 258 (1978) ("[T]he destruction of a

America was not unique in this conflation, it marks a doctrinal shift from the natural rights underpinnings of the *droit moral* to social policy.³⁷

C. *Historical Context*

At the risk of oversimplifying, this section presents some selected background in twentieth-century art and cultural norms to situate VARA historically.

1. High Culture and Cultural Policy

The “culture” or “cultural heritage” referenced by the above legal scholars was synonymous with the arts, or “high culture.”³⁸ Not unrelatedly, the perceived American identity vis-à-vis the fine arts was one of inferiority to Continental Europe, a sentiment that only began to change post-World War II.³⁹ American artists assumed their first prominent international role in these years when the Western art world was dislocated from Paris to New York by the Abstract Expressionists, the heirs apparent to European modernism.⁴⁰ The United States formally entered the Western canon with their highly abstract, massive canvases. The associated critical approach to modern art became formalism, an aesthetic theory that in its most extreme form

work without the author's consent removes something from the cultural heritage of society.”); Arthur L. Stevenson, Jr., *Moral Right and the Common Law: A Proposal*, 6 COPYRIGHT L. SYMP. (ASCAP) 89, 92 (1955) (in addition to protecting personality, the moral right “seeks to preserve the cultural heritage of the nation.”); Mary A. Lee, Comment, *Moral Rights Doctrine: Protection of the Artist's Interest in His Creation After Sale*, 2 ALA. L. REV. 267, 272 (1950) (“The public's interest in the preservation of literature, music, drama, and art is a strong argument for adopting the doctrine [of moral rights].”).

³⁷ See ADENEY, *supra* note 15, at ¶¶ 3.01–3.53.

³⁸ This sentiment may be divined from the pre-war understanding of the term “culture,” as well as the writers' comparative vantages, looking to Western Europe. See, e.g., Roeder, *supra* note 17 (“Busy with the economic exploitation of her vast natural wealth, America has, perhaps, neglected the arts . . .”).

³⁹ See, e.g., John Kreidler, *Leverage Lost: Evolution in the Nonprofit Arts Ecosystem*, in THE POLITICS OF CULTURE: POLICY PERSPECTIVES FOR INDIVIDUALS, INSTITUTIONS, AND COMMUNITIES, *supra* note 5, at 147, 147–50 (“America had a hefty cultural inferiority complex by the late 1950s, by no means a new phenomenon in the nation's history.”).

⁴⁰ See generally DIANE CRANE, THE TRANSFORMATION OF THE AVANT-GARDE: THE NEW YORK ART WORLD, 1940–1985 (1987).

renounced content beyond the self-referential material of the picture plane, a teleological narrative crafted by the extraordinarily influential art critic Clement Greenberg.⁴¹

The Abstract Expressionists were branded with a distinct cultural mythology and American ideology—heroism and individual liberty—that coincided with America's new wealth and power. For the first time, government deliberately aligned itself with the arts, and did so publicly;⁴² it actively promoted Abstract Expressionism abroad, absorbing these artists into Cold War, anti-Communist rhetoric.⁴³ Until that point, the government's principal foray into the arts had been the Federal Art Project, a Depression-era program motivated more by economic recovery than support for the arts.⁴⁴ The new theme of triumphant individualism likewise departed from the collectivist orientation of the 1930s project.⁴⁵

By the early 1960s, amid America's enhanced consumption and abundance, the fine arts became perceived as a scarce resource threatened by increasingly pervasive forms of mass

⁴¹ See, e.g., Jonathan Harris, *Modernism and Culture in the USA, 1930–1960*, in *MODERNISM IN DISPUTE: ART SINCE THE FORTIES* 2, 42–65 (1994) [hereinafter *MODERNISM IN DISPUTE*].

⁴² John D. Rockefeller III testified in Congress that democratic government and the arts are “in league with one another, for they both center on the individual and the fullest development of his capacities and talents.” Margaret J. Wyszomirski, *Raison d'Etat, Raisons des Arts: Thinking About Public Purposes*, in *THE PUBLIC LIFE OF THE ARTS IN AMERICA* 50, 50 (Joni M. Cherbo & Margaret J. Wyszomirski eds., 2000) (quoting John D. Rockefeller III before the U.S. Subcommittee on Education, Arts & Humanities on October 31, 1963 on behalf of Joint Resolution 104 to establish a National Council on the Arts and National Arts Foundation).

⁴³ See Harris, *supra* note 41, at 37, 40. See generally SERGE GUILBAUT, *HOW NEW YORK STOLE THE IDEA OF MODERN ART: ABSTRACT EXPRESSIONISM, FREEDOM, AND THE COLD WAR* (Arthur Goldhammer trans., 2008).

⁴⁴ The Federal Art Project (1935–1943) was established as one of many welfare programs under the Works Progress Administration. See Lawrence D. Mankin, *Federal Arts Patronage in the New Deal*, in *AMERICA'S COMMITMENT TO CULTURE: GOVERNMENT AND THE ARTS* 77, 77–91 (Kevin V. Mulcahy & Margaret Jane Wyszomirski eds., 1995); Emily Genauer, *New Horizons in American Art*, *PARNASSUS*, Oct. 1936, at 3, 3–7.

⁴⁵ The Federal Art Project “proceeded on the principle that it is not the solitary genius but a sound general movement which maintains art as a vital, functioning part of any cultural scene.” Genauer, *supra* note 44, at 3 (quoting Holger Cahill, national director of the Federal Art Project). Cahill had also justified the Project in contravention of European traditions and modernism, stating, “[i]f [the taste of the American people] was not always of the best, it was an honest taste, a genuine reflection of community interests and of community experience.” Harris, *supra* note 41, at 16 (internal quotation marks omitted).

culture.⁴⁶ The “scarce resource” ideology was vividly expressed in the Kennedy era, when the federal government aggressively forged high-art policy initiatives, as realized in the 1965 Congressional legislation that created the National Endowments for the Arts and Humanities.⁴⁷ But the alliance of government and art had begun to unravel even as it formed. After the 1960s, U.S. cultural policy became defined by a “policy of no policy,” rationalized as cultural pluralism, with support for the arts primarily shouldered by individual donors and charitable organizations, incentivized through tax exemptions.⁴⁸

2. The Post-War Art Market

The “art world” today is a quasi-autonomous global market, associated with the wealthiest sector of society. Thomas Crow traces the contemporary roots of its high-end extravagance to marketing efforts by gallery owners Leo Castelli and Ileana Sonnabend in the 1950s and 60s.⁴⁹ Castelli galvanized a successful national market for works by American artists, and he exported this model abroad, relying on the highly recognizable imagery of Pop art.⁵⁰ America had its first art boom in this new vernacular,⁵¹ but Pop’s blurring of the distinction between high art and mass culture also helped trigger the breakdown of Greenberg’s trajectory of modernism.

⁴⁶ See, e.g., Glenn Wallach, *Introduction*, in *THE POLITICS OF CULTURE*, *supra* note 5, at 1, 2–3; see also Arthur Schlesinger, Jr., *Notes on a National Cultural Policy*, DAEDALUS, Spring 1960, at 394, 399 (“As the problems of our affluent society become more qualitative and less quantitative, we must expect culture to emerge as a matter of national concern and to respond to a national purpose.”).

⁴⁷ Wallach, *supra* note 46, at 3; see also Holland Cotter, *The Boom Is Over. Long Live the Art!*, N.Y. TIMES, Feb. 15, 2009, at AR1 (remarking that NEA was established “so Americans wouldn’t keep looking, in the words of Arthur Schlesinger Jr., like ‘money-grubbing materialists’”).

⁴⁸ See, e.g., Kevin V. Mulcahy, *The Government and Cultural Patronage: A Comparative Analysis of Cultural Patronage in the United States, France, Norway, and Canada*, in *THE PUBLIC LIFE OF THE ARTS IN AMERICA*, *supra* note 42, at 138, 145 (describing system as “the distinguishing characteristic of the American cultural condition”).

⁴⁹ Thomas Crow, *Art and Its Markets: Historical Returns*, ARTFORUM, Apr. 1, 2008, at 286, 288.

⁵⁰ *Id.* For characteristic examples of Pop art, see works of Claus Oldenburg, Roy Lichtenstein, James Rosenquist, and Andy Warhol.

⁵¹ See CRANE, *supra* note 40, at 35–41.

With a proliferation of artistic styles and an increased audience, the art world infrastructure in the United States underwent considerable expansion into the 1970s,⁵² buttressed by extrinsic financial support from corporations⁵³ and government;⁵⁴ fine art extended its social and professional reach through its incorporation into the American education system.⁵⁵ The decade that preceded the enactment of VARA was glitzy, as witnessed in the highly publicized and now iconic auction sale of Van Gogh's *Irises* for nearly \$54 million in 1987,⁵⁶ while "neo-expressionist" painters attained levels of publicity formerly associated with the entertainment industry.

Even during these expansive years, however, making a living as a professional artist was not necessarily viable. Artists in the United States have historically continued their pursuit by supplementing income with non-artistic jobs, under the general theory that they are "doing what they love."⁵⁷ Indeed, because of

⁵² As summarized by one author:

Museums added space and activities devoted to modern art; galleries handling modern art increased from 20 to 300; from a dozen or so, the number of serious modern art collectors grew to thousands; exhibitions by painters increased by 50 percent; according to some estimates, the number of people calling themselves artists grew from 600,000 in 1970 to over a million by 1980. . . .

VERA L. ZOLBERG, *CONSTRUCTING A SOCIOLOGY OF THE ARTS* 63 (1990). Between 1970 and 1990, the number of artists (i.e., including musicians, writers, dancers, etc.) doubled in the United States, growing at twice the rate of the overall labor force. NAT'L ENDOWMENT FOR THE ARTS, *ARTISTS IN THE WORKFORCE 1990-2005 1* (2008), available at www.arts.gov/research/artistsinworkforce.pdf; see also Jonathan M. Rotter, *Law, Economics, Technology, and the Social Construction of Art*, 37 J. ARTS MGMT. L. & SOC'Y 281, 283 (2008) (citing similar statistic).

⁵³ See CRANE, *supra* note 40, at 5-8.

⁵⁴ To place government support in perspective, the NEA budget rose from \$2.9 million in 1966 to approximately \$165 million in 1987. Its 2011 budget was approximately \$155 million. *National Endowment for the Arts Appropriations History*, NAT'L ENDOWMENT FOR THE ARTS, <http://www.arts.gov/about/Budget/AppropriationsHistory.html> (last visited Oct. 9, 2013).

⁵⁵ CRANE, *supra* note 40, at 8-11 (stating that the number of Masters of Fine Arts degrees awarded by American schools increased from 525 in 1950 to 8,708 in 1980).

⁵⁶ Three years later, Van Gogh's *Portrait of Dr. Gachet* would sell for \$82.5 million to Japanese businessman Ryoei Saito. Steven R. Weisman, *One Man, Two Masterpieces and Many Questions in Japan*, N.Y. TIMES, May 19, 1990, at 1; see also JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT* 7 (1999) (discussing Saito's "joke" announcement that he would have the work cremated with him).

⁵⁷ According to census data, artists are twice as likely as others in the U.S. labor force to have earned a college degree, yet earn relatively less compensation for their education level. NAT'L ENDOWMENT FOR THE ARTS, *supra* note 52.

the growth in number of artists, competition for representation in galleries and museums intensified, leaving only a fraction to benefit from the enhanced market.⁵⁸ And even among the commercially successful, some artists complained of the inequity in resale profits that inured only to the benefit of the new class of investor-collectors.⁵⁹ The concept of “artists’ rights” and “art law” emerged in this era, with the market booming but scant protection for artists.⁶⁰

3. Cultural Property and Art

Around the time that the United States began carving a niche in the production and marketing of high culture, a much broader conception of culture and “cultural property” was developing in a distinct international convergence of government policies and cultures. Concerns over the deliberate targeting of cultural property by the Nazis resulted in the 1954 Hague Convention on the Protection of Cultural Property.⁶¹ Subsequent deliberation on cultural property assumed a nationalistic orientation, reflected in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.⁶² UNESCO’s

⁵⁸ CRANE, *supra* note 40, at 136.

⁵⁹ One famous example is Robert Rauschenberg’s confrontation with collector Robert C. Scull. In an auction held at Sotheby Park Bernet in 1973, Scull sold Rauschenberg’s combine-painting, *Thaw*, for \$85,000 (purchased by Scull for \$900 in 1958) and *Double Feature* for \$90,000 (purchased for \$2300). Rauschenberg reportedly said to Scull, “I’ve been working my ass off for you to make all this profit,” and shoved him. See Mark L. Favermann, *Artists’ Rights in the U.S.A.: Current Action*, LEONARDO, Spring 1978, at 120, 120.

⁶⁰ *Id.* at 120–21 (discussing legislation reflecting awareness of “the increasing importance of the role of artists in contemporary society and of their punitive treatment in the worlds of commerce and government”); James J. Fishman, *The Emergence of Art Law*, 26 CLEV. ST. L. REV. 481, 482 (1977) (“The major factor in the development of art law has been the art explosion and cultural boom of the past twenty years.”).

⁶¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215, 240 (asserting in preamble that “each people makes its contribution to the culture of the world”).

⁶² Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 232; see also Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2009–12 (2007) (discussing the evolution of cultural property law and UNESCO’s departure from the universalist view of world culture to nationalistic orientation).

main concern, however, was the culture of indigenous populations, antiquities, and sites of historic interest; the arts were only one part.⁶³

In contrast to the exaltation of individualism in the American embrace of Abstract Expressionism, cultural property theory values collective production and collective meaning.⁶⁴ And unlike in the domain of intellectual property, here the United States remains a “market nation”—an importer from “source nations” rather than an exporter.⁶⁵ Yet the Western fine art system has a prominent point of conceptual overlap with the academic and economic valuation of antiquities or artifacts from poorer nations: the authentic, tangible object. Both types of objects have high symbolic and often nationalistic value, and their preservation is deemed a public benefit, especially in museums, which imply a degree of public access. These objects are often grouped under the same academic rubric of art history and may share the auspices of the same museum, even though cultural property consists of objects not necessarily considered “art” in their original context and purpose.

D. *The Entanglement of Preservation and Moral Rights*

Not without coincidence, the most influential of early moral rights enthusiasts, John Merryman, likewise assumed a prominent role in theorizing cultural property law, and his reverence for the physical object is unequivocal.⁶⁶ For Merryman,

⁶³ See Wallach, *supra* note 46, at 1–10. For attempts to define cultural property, see Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 569–70 (1995) (“[T]hose objects that are the product of a particular group or community and embody some expression of that group’s identity, regardless of whether the object has achieved some universal recognition of its value beyond that group.”); Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1142 (1990) (stating that the terms “heritage” and “cultural property” have no specific meaning and may include “human artifacts as well as natural objects or places”).

⁶⁴ See Mezey, *supra* note 62, at 2010–11 (arguing that both universalist and nationalist approaches to cultural property implicate groups).

⁶⁵ Benjamin Folkinshteyn, *National Treasure: Implicit Protections of Cultural Property in the United States*, 37 J. ARTS MGMT. L. & SOC’Y 143, 144 (2007); Mezey, *supra* note 62, at 2010–11.

⁶⁶ See, e.g., John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 355 (1989) [hereinafter Merryman, *The Public Interest*] (“The essential ingredient of any cultural property policy is that the object itself be physically preserved.”).

the interests of artists and the public always intersect at preservation. For this reason, moral rights law is unproblematical in serving “dual purposes: to protect the artist against alteration of the work of art and to protect the public against alteration or destruction of the culture.”⁶⁷ For Joseph Sax, a cultural preservation scholar, moral rights similarly enable the pursuit of this other vital interest: “When American legislatures finally began to consider enacting *droit moral* statutes, the question understandably arose, why not protect the art, which is the ultimate product of the artist’s work and the gift of creative genius to the world, as well as his or her reputation?”⁶⁸

A flurry of moral rights bills were introduced in the late 1970s and 80s, at the federal level and in individual states, primarily aimed at the visual arts.⁶⁹ Seizing upon America’s recently-acquired stature in the international art world, Merryman implored in 1976, “Given the cultural importance of American art, should our law be modified in such a way as to protect the integrity of works of art? I believe that the answer to that question is clearly ‘yes.’”⁷⁰ The literature on moral rights tracks this “cultural importance,” dramatically increasing as American art became relevant internationally, economically, culturally, and in the academic humanities. In 1940, the paucity

⁶⁷ *Id.* at 343–44.

⁶⁸ SAX, *supra* note 56, at 22 (“Despite the conceptual distinction . . . protection of an artist’s moral right can simultaneously implement the society’s interest in protecting its artistic heritage.”).

⁶⁹ See, e.g., ME. REV. STAT. ANN. tit. 27, § 303 (2012) (effective 1985) (applying to works of “fine art”); CAL. CIVIL CIV. CODE § 987 (West 2012) (effective January 1, 1980) (applying to works of “[f]ine art” of “recognized quality”); Visual Artists Moral Rights Amendment of 1979, H.R. 288, 96th Cong. (1979) (same); Visual Artists Moral Rights Amendment of 1977, H.R. 8261, 95th Cong. (1977) (aimed at “the distortion, mutilation, or other alteration” of “pictorial, graphic, or sculptural works”); Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 BULL. COPYRIGHT SOC’Y 1, 47 (1980) (“[T]here is little question that at least a right to protect art works from mutilation is emerging in this country.”).

⁷⁰ See Merryman, *supra* note 1, at 1042 (also referencing “the triumph of American art” as a reason for adopting moral rights). “Triumphalist” rhetoric was a hallmark of Clement Greenberg’s essays. See, e.g., Clement Greenberg, “*American-Type*” *Painting*, in ART AND CULTURE: CRITICAL ESSAYS 208, 208 (1989).

of scholarship was remarked upon, but by 1980—ten years prior to VARA—it was already “the subject of exhaustive scholarly attention.”⁷¹

A portion of the enacted state statutes spoke to the public interest as much as the artists.⁷² The popular wisdom of entangling moral rights with the protection of unique objects of art acquired a stronghold, as summed up by Edward Damich: “Protecting irreplaceable works from irreversible physical changes presents the most compelling case for moral rights protection.”⁷³

II. VARA: OBJECT AND AUTHOR

This section highlights how cultural preservation policy bested artist-based rationales in VARA’s legislative history. It then provides a textual analysis demonstrating how VARA’s operative provisions, despite using moral rights language, privilege the object over the artist. The section concludes with a discussion of the mutual restraints embedded in VARA’s dual objectives.

A. Legislative History

VARA’s immediate legislative history begins in ambivalence, with the United States’ accession to the Berne Convention in 1989. Specifically, the United States took steps to ensure that its accession would require no new legislation, in keeping with its

⁷¹ DaSilva, *supra* note 69, at 39.

⁷² MASS. GEN. LAWS ANN. ch. 231, § 85S(a) (West 2012); CAL. CIV. CODE § 987(a) (“[T]here is also a public interest in preserving the integrity of cultural and artistic creations.”); N.M. STAT. ANN. § 13-4B-1 (West 2012); *see also* CAL. CIV. CODE § 989(c) (effective Jan. 1, 1983) (permitting certain charitable institutions to enforce some rights granted to artists). The New York statute offered an alternate paradigm. *See* N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2012) (making no mention of public or societal interest in art). At the time VARA was enacted, eleven states had artists’ rights or art preservation statutes, including Massachusetts, Connecticut, California, New York, Maine, Louisiana, New Jersey, Illinois, Pennsylvania, New Mexico, and Rhode Island. H.R. REP. NO. 101-514, at 8, 22 n.18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919 & n.18.

⁷³ Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 950 (1990); *see also* Bird, *supra* note 9 (“Without moral rights protection artworks could be placed in jeopardy.”); Elizabeth M. Bock, Note, *Using Public Disclosure as the Vesting Point for Moral Rights Under the Visual Artists Rights Act*, 110 MICH. L. REV. 153, 162 (2011) (noting VARA serves “the public’s interest in preserving its culture through preserving art”).

longstanding position that functional equivalents to moral rights could be found in a patchwork of existing state and federal laws, including contract, privacy torts, unfair competition, defamation, copyright, the Lanham Act, etc., sufficient to meet the requirements in Article 6bis.⁷⁴ Congress enacted the Berne Convention Implementation Act of 1988, which provided that Berne was not self-executing and that Berne's provisions "do not expand or reduce" existing authors' rights.⁷⁵ Further, the Agreement on Trade-Related Aspects of Intellectual Property subsequently excluded Article 6bis from the "rights or obligations" listed therein.⁷⁶

Although VARA is clearly related to Berne accession, it was hardly an inevitable outcome; VARA was enacted on the last day of the 101st Congress, within a bill authorizing eighty-five new federal judgeships.⁷⁷ The proposed bill, contrary to Berne, limited protection to the visual arts. And Congress was explicit about its dual agenda: "protect[ing] both the reputations of certain visual artists and the works of art they create."⁷⁸ Notably, copyright inequity for visual artists had long been a component of the moral rights conversation,⁷⁹ including lack of resale royalty rights.⁸⁰ This concern reappears in VARA's

⁷⁴ See, e.g., Netanel, *supra* note 15, at 25–26; Justin Hughes, *American Moral Rights and Fixing the Dastar "Gap"*, 2007 UTAH L. REV. 659, 665–68.

⁷⁵ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 §§ 2–3, 102 Stat. 2853, 2853 (codified as amended in 17 U.S.C. § 101).

⁷⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299, 304, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

⁷⁷ KWALL, *supra* note 7, at 28; Peter K. Yu, *Moral Rights 2.0*, in LANDMARK INTELLECTUAL PROPERTY CASES AND THEIR LEGACY 13, 14 (Christopher Heath & Anselm Kamperman Sanders eds., 2011).

⁷⁸ H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915.

⁷⁹ See 123 CONG. REC. E6270–72 (daily ed. Oct. 13, 1977) (statement of Rep. Drinan) (asserting that "‘visual’ artists are the least organized and least protected among artists in America"); Favermann, *supra* note 59, at 120–21.

⁸⁰ E.g., *Visual Artists' Rights Act of 1987: Hearing on H.R. 3221 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong. 3 (1989) ("[T]o secure the rights of authors of pictorial, graphic, or sculptural works to prevent the distortion, mutilation, or other alteration of such works, to provide for resale royalties, and for other purposes."); see also 133 CONG. REC. E4257 (daily ed. Oct. 29, 1987) (statement of Rep. Markey) (referencing work by Jasper Johns sold for \$3.6 million, purchased for \$2,250 in 1960).

immediate legislative history,⁸¹ but what passed in 1990 were the Berne-mandated non-economic rights of integrity and attribution.⁸² VARA rights were rendered waivable.⁸³

While detailing their efforts to limit and contain the bill, legislators also described the purpose of the statute as “consistent with the purpose behind the copyright laws and the Constitutional provision they implement: ‘To promote the Progress of Science and useful Arts.’”⁸⁴ Analogous to copyright’s utilitarian thrust, “[t]he theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation.”⁸⁵ At times, the bill was pitched as “fill[ing] a gap” in copyright law that had eluded visual artists because their work was treated as a “physical piece of property, rather than as an intellectual work, like a novel.”⁸⁶ But at other points, more quasi-religious rhetoric was employed, suggesting a different kind of right altogether, e.g., “[t]his bill recognizes that title to the soul of an art work does not pass with the sale of the art work itself.”⁸⁷

The most consistent argument for moral rights emerged in art preservation, as its own end. The Act is specifically predicated on the “preservation model” of moral rights, whereby the destruction of works of art not only affects an artist’s reputation, but also “represents a loss to society.”⁸⁸ According to its supporters, “[t]he bill furthers the preservation concept and *provides in the most effective way for the protection of the work by*

⁸¹ See, e.g., H.R. REP. NO. 101-514, at 7, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6918 (“Visual artists, such as painters and sculptors, have complained that . . . the American copyright system does not enable them to share in any profits upon resale of their works.”).

⁸² 17 U.S.C. § 106A(a) (2006). Resale royalty rights and waiver were made the subject of a future study by the Copyright Office. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, § 608, 104 Stat. 5089, 5132 (1990).

⁸³ 17 U.S.C. § 106A(e).

⁸⁴ H.R. REP. NO. 101-514, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915 (footnote omitted) (quoting U.S. CONST. art. I, § 8, cl. 8).

⁸⁵ *Id.* (quoting *Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 32 (1990) (statement of Ralph Oman, Reg. of Copyrights)).

⁸⁶ 136 CONG. REC. H8271 (daily ed. Sept. 27, 1990) (statement of Rep. Markey) (“It is time that visual artists receive the fundamental copyright protection for the integrity of their work already provided to authors.”).

⁸⁷ *Id.*

⁸⁸ H.R. REP. NO. 101-514, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6926.

giving the artist the right of integrity and the power to enforce it.”⁸⁹ Under this construct, artists are cast as enforcement mechanisms for preserving art rather than persons seeking copyright parity, private reputational protections, or bargaining power.

VARA's legislative history also promotes it as an important tool in cultural preservation efforts for the public welfare,⁹⁰ for example, “By creating a right of integrity, [VARA] . . . protects society against the mutilation and destruction of those works of visual art that make up an important part of our cultural heritage”⁹¹ Professor Jane Ginsburg testified that the integrity right would not only “enhance the creative environment in which artists labor,” but would also “enhance our cultural heritage.”⁹² Legislators and witnesses littered their statements with references to “American culture,” “our civilization,” and “national treasures.”⁹³

VARA's prototypical art object and its vulnerability was memorably illustrated. In 1986, two Australian entrepreneurs purchased a Picasso print, *Trois Femmes*, cut it into 500 one-inch squares and offered to sell each square for \$135.⁹⁴ The consequences of this act, said Representative Markey, constitute the type of abhorrent, irreparable damage “which passage of the bill we are discussing today will protect against.”⁹⁵ As he

⁸⁹ *Id.* (emphasis added); see also 135 CONG. REC. E2199 (daily ed. June 20, 1989) (statement of Rep. Kastenmeier) (“We should always remember that the visual arts covered by this bill meet a special societal need, and that their protection and preservation serve an important public interest.”).

⁹⁰ See 133 CONG. REC. E4257 (daily ed. Oct. 29, 1987) (statement of Rep. Markey) (“Works of art . . . belong to no one because they belong to all of us.”).

⁹¹ 136 CONG. REC. H13,313 (daily ed. Oct. 27, 1990); see also 135 CONG. REC. S6811 (daily ed. June 16, 1989) (statement of Sen. Kennedy) (“Congress can no longer overlook its responsibility to safeguard the Nation's artistic heritage.”).

⁹² *Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 82 (1990) (statement of Prof. Jane Ginsburg) (emphasizing “interests of artists and public alike”).

⁹³ See H.R. REP. NO. 101-514, reprinted in 1990 U.S.C.A.N. 6915, 6916–17.

⁹⁴ 136 CONG. REC. H8271 (daily ed. Sept. 27, 1990) (statement of Rep. Markey). The newspaper ads read, “Yes, your very own beautiful framed Picasso piece, in the most original and exciting offer.” *Id.*

⁹⁵ *Id.* VARA actually would not have prevented slicing and dicing a painting by Picasso because the rights inure only to living artists; Picasso died in 1973. R. B. Ekelund, Jr. et al., *The “Death-Effect” in Art Prices: A Demand-Side Exploration*, 24 J. CULTURAL ECON. 283, 284 (2000).

explained, intimating the threat of a distinctly public harm, “[w]e don’t want profiteers roaming the world giving artistic masterpieces the chop.”⁹⁶

B. VARA’s Text

As suggested by VARA’s somewhat hasty, surreptitious enactment, its text was not subject to intensive discussion or deliberation,⁹⁷ and it offers an odd balance of personhood and object interests. VARA’s author-orientation is manifest principally through limitations on the rights it confers, such as non-transferability and duration fixed at the author’s life.⁹⁸ The statute’s protected class is defined and delimited by the object, as are the implementing provisions of the right of integrity.

1. Art, Defined

VARA created a new category of works of art rather than utilizing copyright law’s preexisting definition, “pictorial, graphic, and sculptural works.”⁹⁹ As a co-sponsor explained, “we have gone to extreme lengths to very narrowly define the works of art that will be covered.”¹⁰⁰ VARA’s limited reach to unique physical objects that exist in single copies or limited editions was viewed as a “critical underpinning of the limited scope of the bill”¹⁰¹ and was associated with the preservation agenda.¹⁰²

VARA’s “work of visual art” consists of “a painting, drawing, print, or sculpture, existing in a single copy,” as well as “a still photographic image produced for exhibition purposes only,” or

⁹⁶ 136 CONG. REC. H8271 (daily ed. Sept. 27, 1990) (statement of Rep. Markey).

⁹⁷ See *supra* text accompanying note 77; see also KWALL, *supra* note 7, at 147 (arguing that VARA’s primary problem arises from lack of thoughtful deliberation).

⁹⁸ 17 U.S.C. §§ 106A(d)(1), (e) (2006). An exception to lifetime duration applies if the work at issue was created before the effective date of the statute, assuming title has not yet transferred. In that instance, the moral rights term is coextensive with the copyright term provided under § 106. *Id.* § 106A(d)(2). For collaborative works, the duration extends to the last surviving author. *Id.* § 106A(d)(3). Lifetime duration is inconsistent with Berne’s requirement that moral rights last for a period coextensive with copyright protection in each member state. See KWALL, *supra* note 7, at 37.

⁹⁹ 17 U.S.C. § 102(a)(5).

¹⁰⁰ 135 CONG. REC. E2227 (daily ed. June 20, 1989) (statement of Rep. Markey).

¹⁰¹ H.R. REP. NO. 101–514 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6921.

¹⁰² See, e.g., 136 CONG. REC. H3114 (daily ed. June 5, 1990) (statement by Rep. Moorhead) (“[T]his narrow definition is essential to ensuring that the legislation is limited to protecting and preserving [sic] qualifying works that exist in single copies or limited editions.”).

signed, numbered limited editions of the same.¹⁰³ In conjunction with this selective inventory, VARA also identifies exclusions, most notably a “motion picture or other audiovisual work,” and a work made for hire or one made for promotional or advertising purposes.¹⁰⁴ VARA also bars “any work not subject to copyright protection under this title.”¹⁰⁵

2. Prohibiting Modification, and Exceptions

Although VARA's modification provision is aimed at prejudice to an artist's “honor or reputation,”¹⁰⁶ it does not recognize any harm that leaves the original object intact.¹⁰⁷ Thus, distortion of a reproduction, however widely disseminated or personally injurious, is not within VARA's purview.¹⁰⁸ For example, VARA offered no assistance to Frederick Hart in his lawsuit against Warner Brothers for its rendition of his sculpture

¹⁰³ 17 U.S.C. § 101. The full provisions read:

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

Id.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 17 U.S.C. § 106A(a)(3)(A) (language adopted verbatim from Berne Convention). An author of a work of visual art has the right “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.” *Id.*

¹⁰⁷ *Id.* § 106A(c)(3) (providing that any “reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a)”).

¹⁰⁸ See *id.* To contrast, in a French case from 1911, the son of Francois Millet brought an action against two publishers for their reproductions of Millet's painting, *The Angelus*. Millet's son argued that both publishers should be enjoined from publication for misrepresenting his father's work. The court agreed that changes in a woman's bonnet and scarf, lighting, and other similarly “vulgar” modifications constituted an offense of Millet's right of integrity. Similarly, a French court found that Galeries Lafayette, a department store, violated Henri Rousseau's right of integrity by displaying reproductions of his work in a different color and form than the original. See Merryman, *supra* note 1, at 1029–30 (discussing the Millet and Rousseau cases).

Ex Nihilo in the film *Devil's Advocate*, given that the original object was untouched.¹⁰⁹ One commentator explains that “imposing liability in these situations would not further the paramount goal of the legislation: to preserve and protect certain categories of original works of art.”¹¹⁰

Despite the oft-mentioned public interest in preserving art, VARA is disassociated from the act of displaying art to the public; in theory, a mutilated object may injure the artist's honor or reputation even if it remains hidden in a closet.¹¹¹ As a corollary, the discontinued display of an art work is not prohibited if the object remains unaltered.¹¹² Finally, the statute specifically excepts modification caused by “public presentation, including lighting and placement,” unless resulting from gross negligence.¹¹³

3. Destroying Art

VARA's anti-destruction provision, ironically, exceeds the norms of virtually all civil and common law countries, as well as the minimalist requirements of Berne, by redressing the intentional or grossly negligent destruction of art.¹¹⁴ As the

¹⁰⁹ The movie featured Satan as a managing partner of a New York law firm, and his penthouse included a wall-sized bas-relief resembling *Ex Nihilo*. Near the end, the human forms in the bas-relief appear to writhe erotically, which Hart found offensive to his beliefs. See 2 RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 1282–83 (3d ed. 2005). The case settled, with Warner agreeing to edit the DVD version and attach a disclaimer. *Id.*; see also *The Devil's Advocate*—Warner Bros. and Frederick Hart, BENEDICT.COM, <http://www.benedict.com/visual/devil/devil.aspx> (last visited Oct. 10, 2013) (showing video clips and disclaimer).

¹¹⁰ MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 8D.06(B)(2) (2010), quoted in *Berrios Noguerras v. Home Depot*, 330 F. Supp. 2d 48, 51 (D.P.R. 2004) (dismissing a VARA action based on unauthorized reproduction of painting in advertising brochures).

¹¹¹ See, e.g., *Pavia v. 1120 Ave. of the Ams. Assocs.*, 901 F. Supp. 620, 627 (S.D.N.Y. 1995) (“VARA lays its focus on the acts of alteration themselves, without reference to subsequent display.”).

¹¹² *English v. BFC & R E. 11th St. LLC*, No. 97 Civ. 7446(HB), 1997 WL 746444, at *6 (S.D.N.Y. Dec. 3, 1997) (finding VARA inapplicable when real estate development would obstruct the view of several murals because the murals “will not be physically altered in any way”).

¹¹³ 17 U.S.C. § 106A(c)(2) (2006).

¹¹⁴ *Id.* § 106A(a)(3)(B) (providing the right “to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right”). For further discussion on destruction, see sources cited *supra* note 19. Although one might read into Berne a “right ‘of preservation,’” it is not required expressly. Justin Hughes, *The Line Between Work and Framework*,

Second Circuit aptly observed in the first VARA case litigated, protecting a work from destruction “represents a fundamentally different perception of the purpose of moral rights,”¹¹⁵ meaning one based on “the public interest in preserving a nation’s culture.”¹¹⁶ If the right protects personality, the court elaborated, “destruction is seen as less harmful than the continued display of deformed or mutilated work that misrepresents the artist.”¹¹⁷ Only works of “recognized stature” warrant protection from complete destruction, a gatekeeping mechanism not defined in the statute nor required by the mutilation provision.¹¹⁸ In considering the proposed beneficiaries of this right—artist and society—it is only consistent with the latter that the protected work has stature.¹¹⁹ Finally, this provision does not include the “honor or reputation” language employed under modification.¹²⁰

Text and Context, 19 CARDOZO ARTS & ENT. L.J. 19, 22 (2001). The closest approximation of such a right would be in Swiss law, where an owner must offer to sell the work back to its creator prior to destruction. KWALL, *supra* note 7, at 44.

¹¹⁵ *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

¹¹⁶ *Id.*; see also *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324 (S.D.N.Y. 1994) (“This provision is preservative in nature: Congress was concerned that the destruction of works of art represented a significant societal loss.”), *aff’d in part and rev’d in part*, 71 F.3d 77 (2d Cir. 1995); 136 CONG. REC. H3113 (daily ed. June 5, 1990) (statement of Rep. Kastenmeier) (explaining that the destruction provision was included because “[s]ociety is the ultimate loser when . . . works are modified or destroyed”).

¹¹⁷ *Carter*, 71 F.3d at 81–82. However, several commentators contend that protecting an artist’s work from destruction soundly supports a personality-based integrity right, positing destruction as the endpoint of disrespect on a continuum with mutilation. See, e.g., *id.* (citing 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1044 n.128 (1994)); 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16:24 (2012) (“Destruction of a work certainly shows the utmost contempt for the artist’s honor or reputation.”); KWALL, *supra* note 7, at 45 (arguing that the notion of destruction having no adverse consequences “is not relevant to those instances where a work is destroyed in a manner that subjects the creator to shame or embarrassment”); Robinson, *supra* note 8, at 1964 (“[T]here is little validity to the argument that the complete destruction of an artist’s work of art results in no harm to his honor or reputation.”).

¹¹⁸ In theory, the artist need not have recognized stature. See Robinson, *supra* note 8, at 1952; cf. *Carter*, 861 F. Supp. at 325 n.12 (opining that work may attain stature after filing lawsuit).

¹¹⁹ See, e.g., Damich, *supra* note 73, at 955 (“[A]dopting a quality criterion changes the focus of the statute from moral rights to art preservation.”).

¹²⁰ 17 U.S.C. § 106A(a)(3)(B) (2006). However, omission of the honor or reputation language may simply reflect oversight or careless drafting. See *supra* notes 77, 97 and accompanying text.

C. *The Paralysis of Equipose*

VARA's proposition of protecting the artist and preserving the object, while seemingly an enhancement of traditional moral rights, is substantially limiting at either end. Some of the consequences for artists are identified in the preceding section. In addition, at the policy level, emphasizing physical preservation and types of objects marginalizes the intrinsic, intellectual dimension of producing art, a result that nearly subverts the statute's grounding as intellectual property law.¹²¹ Jane Ginsburg has described VARA as a private "Landmarks law" for art work, asserting "real moral rights do more than that."¹²² More pejoratively, a major treatise complains that "[a]t the abstract (or perhaps fustian) level, traditional copyright law protects art; by contrast, the Visual Artists Rights Act protects artifacts."¹²³

In addition, despite emphatic containment, VARA's object focus negatively redounds to other forms of creative expression. Because VARA only encompasses unique objects, its core mission of protecting authorship interests seems ill-disposed for incremental expansion to other media, whose regular existence is in copies.¹²⁴ This is problematic if, like Professor Kwall, one believes that "[a]uthors of literary, musical, and other copyrighted works are as vulnerable to moral rights violations as are visual artists."¹²⁵ Several scholars contend that VARA's narrow class of eligible objects has fostered "negative spillover" effects;¹²⁶ not only are state statutes preempted, but VARA's

¹²¹ As noted, one stated premise of the VARA was achieving copyright parity for visual artists. See 135 CONG. REC. E2227 (daily ed. June 20, 1989) (statement of Rep. Markey) ("Unlike the works of literary or performing artists, artworks created by visual artists are treated more as physical objects than as expressions of the artistic creativity of their authors."); *supra* notes 79, 86 and accompanying text.

¹²² Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9, 10–11 (2001).

¹²³ NIMMER & NIMMER, *supra* note 110, § 8D.06(A)(2) (footnotes omitted).

¹²⁴ See *The 101st Congress: A Review of Amendments to the Copyright Act*, 37 J. COPYRIGHT SOC'Y U.S.A. 462, 466 (1990) ("[VARA] should be regarded as an initial, extremely tentative step toward a federal regime for moral rights.").

¹²⁵ Roberta Rosenthal Kwall, "Author-Stories": *Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 30 (2001); see also Kwall, *supra* note 7, at 148–49 (calling for expanded protection).

¹²⁶ See, e.g., Bird, *supra* note 9, at 424 ("Courts now invariably interpret VARA to mean that no cause of action outside of VARA, regardless of its origin, can support a claim that resembles a moral right because of VARA's narrow application.").

existence has been construed as a pronouncement that Congress affirmatively rejects any right resembling moral rights outside of its limited scope.¹²⁷ Thus, courts may have been more willing to entertain matters of authorial dignity before VARA framed the issue as one exclusive to fine art objects.¹²⁸

However, despite its considerable emphasis on the physical object, VARA is not a functional preservation statute.¹²⁹ VARA's preservation objective is reciprocally delimited by its personhood interests, most prominently the lifetime duration.¹³⁰ Accordingly, a major fallacy of the *Trois Femmes* example relied upon by legislators is that VARA would not have prevented "the chop," because Picasso was dead. The statute lacks a key attribute of cultural preservation initiatives: perpetuity, or at least a decisive term, and, correspondingly, someone to exercise the right other than the artist.¹³¹ Moreover, VARA's preservation goals limit America's cultural heritage to not just art, but contemporary art.

¹²⁷ See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34–35 (2003); Rigamonti, *supra* note 22, at 405–08.

¹²⁸ See, e.g., *Preminger v. Columbia Pictures Corp.*, 49 Misc. 2d 363, 372, 267 N.Y.S.2d 594, 603–04 (Sup. Ct. N.Y. Cnty. 1966), *aff'd*, 25 A.D.2d 830, 269 N.Y.S.2d 913 (1st Dep't), *aff'd*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80. In that case, the defendant licensed Otto Preminger's motion picture *Anatomy of a Murder* for television viewing. Preminger sought an injunction, complaining that the license agreements gave stations the right to cut portions of his film and offer commercial interruptions, which he claimed detracted from the film's "artistic merit" and damaged his reputation. The court stated that "the law is not so rigid, even in the absence of contract, as to leave a party without protection against publication of a garbled version of his work." *Id.* at 366, 267 N.Y.S.2d at 599. Although the court held for the defendant, it implied that if the movie were significantly mutilated, the director might have a case. *Id.* at 372, 267 N.Y.S.2d at 603–04.

¹²⁹ Many scholars have focused on rectifying this aspect of its agenda. See, e.g., Elizabeth Dillinger, Note, *Mutilating Picasso: The Case for Amending the Visual Artists Rights Act To Provide Protection of Moral Rights After Death*, 75 UMKC L. REV. 897, 899–900 (2007); Cambra E. Stern, Comment, *A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 UCLA L. REV. 849, 852 (2004); Seth Tipton, Note, *Connoisseurship Corrected: Protecting the Artist, the Public and the Role of Art Museums Through the Amendment of VARA*, 62 RUTGERS L. REV. 269, 274 (2009).

¹³⁰ Cf. Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 361 (1989) (asserting with respect to state moral rights statutes that "[l]imited duration seems inconsistent with the interest of preservation"); Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431, 463 (1994) (concluding that artists' moral rights are not really intended for cultural preservation, due to lifetime limitation).

¹³¹ VARA's reliance on self-selection also does not make desirable preservation policy.

A masterpiece so renowned posthumously—the usual circumstance—will have no protection, making for strange omissions in this putative collection of American history.¹³²

In sum, considering its dual ambitions, VARA is highly flawed. The next section unbundles the contradictions that inhere in fashioning moral rights around objects.

III. OBJECT AND OBJECTIVE: SITES OF CONFLICT

Because VARA aims to protect the integrity of objects, a district court found a “painful irony” when Swiss artist Christoph Büchel sought, in conjunction with his VARA counterclaims against the Massachusetts Museum of Contemporary Art (“MASS MoCA”), to have his own work destroyed.¹³³ Two years prior, Büchel had embarked on an installation called *Training Ground for Democracy* in MASS MoCA’s football field-sized gallery known as “Building 5,” at the museum’s expense.¹³⁴ As the work progressed, the relationship between Büchel and the museum became acrimonious, and Büchel eventually terminated the project, accusing MASS MoCA of not following his instructions and exhibiting a lack of professionalism. At this point, the museum had invested nearly \$300,000—well over budget—and had postponed the already-publicized exhibition in an effort to meet Büchel’s demands and instructions, often delivered off-site. MASS MoCA sought a declaratory judgment from a federal district court that it was entitled to display the work in its unfinished state, and Büchel counterclaimed under VARA, along with a request to have the work destroyed at the museum’s expense.¹³⁵

¹³² Professor Sax has remarked that “the operative provisions of [VARA] are unmistakably focused on the rights of the artist, rather than of the society.” SAX, *supra* note 56, at 26.

¹³³ As the district court noted, its comment was technically tangential to the legal issues because there is no cause of action to *seek* destruction under VARA; Büchel merely supplemented his moral rights claims with this request. *See* Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 260 n.7 (D. Mass. 2008), *aff’d in part and vacated in part*, 593 F.3d 38 (1st Cir. 2010).

¹³⁴ This arrangement was never memorialized in writing. *Id.* at 250.

¹³⁵ The district court held for the museum and dismissed Büchel’s VARA claims. *See id.* at 261. Despite the ensuing appeal, Büchel’s request for destruction became moot when the museum changed course and elected not to pursue the exhibition. The First Circuit partially vacated and partially affirmed the district court’s order dismissing Büchel’s claims and, in relevant part, held that Büchel had raised a material issue of fact as to whether the museum had modified the installation over

There was a “painful irony” in this case, wrote the district court in a footnote, because “one critical purpose of VARA is to *preserve* art.”¹³⁶ The court explained, citing Franz Kafka, Vladimir Nabokov, and the poet Virgil, that, “[t]he public as the beneficiary of great art has its own legitimate interest in preservation, which sometimes can trump the artist’s will.”¹³⁷

Judge Posner’s positioning of the public interest over that of the artist illustrates how VARA’s object orientation has decentered its moral rights agenda. Once authorship is subordinated to the preservation of “great art,” VARA loses its footing in copyright law’s doctrinal terrain. Neither does U.S. policy or law offer a strong foundation for preserving visual art as a form of cultural heritage. Indeed, it becomes fair to question what VARA is doing at all.

This section is divided into three parts, reflecting facets of the archetypal objects implicated under the statute: material, cultural, and transcendent. These qualities carry assumptions that inform VARA’s preservation theme, yet when contextualized, reveal conflicting impulses that have belied VARA’s implementation and discourse over the past two decades.

A. *The Physical Object*

“VARA established a new and distinct genus of art: ‘work[s] of visual art’”¹³⁸

By assuming art preservation as a critical purpose, VARA adopts a museological stance. It embraces the primacy of the unique, authentic art object as evidence of the author’s genius and as a complete narrative unto itself.¹³⁹ Its broader cultural narrative is thus hierarchical, segregating certain types of material goods for heightened protection—an endeavor not

Büchel’s objections, and as to whether the alleged modifications had a detrimental impact on the artist’s honor or reputation. *See* Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38, 65–66 (1st Cir. 2010).

¹³⁶ *Buchel*, 565 F. Supp. 2d at 260 n.7.

¹³⁷ *Id.* at 249 n.1. These authors charged others with posthumous destruction of certain unpublished works. *See id.*

¹³⁸ *Lilley v. Stout*, 384 F. Supp. 2d 83, 86 (D.D.C. 2005).

¹³⁹ *See* Jan Marontate, *Rethinking Permanence and Change in Contemporary Cultural Preservation Strategies*, 34 J. ARTS MGMT L. & SOC’Y 285, 286 (2005) (“[P]rofessional standards and practices in the museum field developed in a context where the art object itself was the primary record of the creative act.”). The museum retrospective of an artist or catalogue raisonne exemplify this approach.

dissimilar to that undertaken by a museum of contemporary art.¹⁴⁰ However, as a federal statute with mandates and penalties, VARA raises the stakes, translating aesthetics into law.¹⁴¹ Moreover, unlike a museum, its actual space is relatively unbounded and its cultural authority negligible.

This section charts the conflicts prompted by objects whose cultural meaning resides in the interstices of physical and intellectual property. This section also examines the legally and art historically fraught enterprise of VARA's implied material hierarchy.

1. VARA's Material World

Although courts systematically reiterate the lofty rhetoric of the artist's spirit and honor culled from VARA's legislative history,¹⁴² the tangible object is usually dispositive of the claim. Many cases do not survive the threshold assessment of whether the subject constitutes a work of art under VARA's definition,¹⁴³

¹⁴⁰ Gertrude Stein famously considered this brand of museum impossible. See Bruce Altshuler, *Collecting the New: A Historical Introduction*, in COLLECTING THE NEW 1, 1 (Bruce Altshuler ed., 2007).

¹⁴¹ I would distinguish the kind of "aesthetic justice" implicit in the museum institution. See Robert Storr, *To Have and To Hold*, in COLLECTING THE NEW, *supra* note 140, at 29, 39–40 (likening museum acquisition process to courtroom).

¹⁴² See, e.g., *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 49 (1st Cir. 2010); *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 133 (1st Cir. 2006) ("The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation.") (citations omitted); *Martin v. City of Indianapolis*, 192 F.3d 608, 611 (7th Cir. 1999); *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (describing moral rights as "rights of a spiritual, non-economic and personal nature [that] . . . spring from a belief that an artist in the process of creation injects his spirit into the work").

¹⁴³ E.g., *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 306 (7th Cir. 2011) (holding art work consisting of a living garden was not protectable under VARA because it lacked fixity required for copyright protection), *cert. denied*, 132 S. Ct. 380 (2011); *Nat'l Ass'n for Stock Car Auto Racing, Inc. (NASCAR) v. Scharle*, 184 F. App'x 270, 276 (3d Cir. 2006) (finding plaintiff's drawings for NASCAR trophy did not meet VARA definition because they did not exist in a single copy or as limited edition, or alternatively because they were technical drawings); *Phillips*, 459 F.3d at 143 (holding VARA's definition of art does not include site-specific works of art); *Pollara v. Seymour*, 344 F.3d 265, 271 (2d Cir. 2003) (finding mural did not meet VARA's definition of art because it was promotional in nature); *Carter*, 71 F.3d at 88 (holding that sculpture constituted work made for hire and therefore did not meet VARA's definition of a work of art); *Landrau v. Solis Betancourt*, 554 F. Supp. 2d 102, 111 (D.P.R. 2007) (finding neither architectural plans nor designs embodied in the building were within VARA's definition of art); *Lilley*, 384 F. Supp. 2d at 88–89 (finding photographic prints were not art under VARA because they were not produced exclusively for exhibition purposes); *Peker v. Masters Collection*, 96 F.

which courts have interpreted narrowly. VARA case law frequently appears less concerned with authorship than artifact taxonomy.

VARA's answer to the philosophical query "*what is art?*" is a classification scheme principally organized by physical medium and traditional qualities of uniqueness and rarity. VARA incorporates a particular idea about the role of art in certain purpose-based requirements, such as the photograph "produced for exhibition purposes only," or the advertising exclusion. The limited edition *Trois Femmes* lithograph in the Picasso example suggests the prototypical unique, autonomous object created for the aesthetic "use" of hanging on a wall. But VARA objects, at least in the published case law, look different. They are, for example, less autonomous from their environments, physically or conceptually or both.¹⁴⁴ And they are typically large-scale,

Supp. 2d 216, 221–22 (E.D.N.Y. 2000) (finding posters excluded from VARA's definition of art); *see also* Kleinman v. City of San Marcos, 597 F.3d 323, 329 (5th Cir. 2010) (finding wrecked, painted automobile used as cactus planter to be symbolic of store's corporate image and therefore promotional in nature, outside VARA's protection); Lee v. A.R.T. Co., 125 F.3d 580, 582–83 (7th Cir. 1997) (noting in dicta that note cards and lithographs existed neither as single copies nor signed limited editions, precluding applicability of VARA); Cheffins v. Stewart, No. 3:09-CV-00130-RAM, 2011 WL 1233378 (D. Nev. Mar. 29, 2011) (work in which façade of sixteenth-century Spanish galleon was wrapped around school bus constituted applied art, precluded from VARA's embrace by definition).

¹⁴⁴ *See, e.g., Kelley*, 635 F.3d at 291 (two football-field sized gardens in public space); *Phillips*, 459 F.3d at 130 (public sculpture park); *Carter*, 71 F.3d at 80 (sculpture built into lobby of building); *Hunter v. Squirrel Hill Assocs.*, 413 F. Supp. 2d 517, 518 (E.D. Pa. 2005) (mural on exterior of building); *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01 Civ. 1226 DAB, 2003 WL 21403333, at *2 (S.D.N.Y. June 17, 2003) (mural on exterior of building); *Hanrahan v. Ramirez*, No. 2:97-CV-7470 RAP RC, 1998 WL 34369997, at *1 (C.D. Cal. June 3, 1998) (outdoor mural); *English v. BFC & R E. 11th St. LLC*, No. 97 Civ. 7446(HB), 1997 WL 746444, at *1 (S.D.N.Y. Dec. 3, 1997) (five murals on outside of buildings plus garden sculptures), *aff'd*, 198 F.3d 233 (2d Cir. 1999).

designed for an outdoor, public or quasi-public, venue.¹⁴⁵ They are made from non-traditional materials, not exclusively controlled by the artist's hand.¹⁴⁶

Part of this rift arises from the law's cultural lag. Although VARA is associated with the Romantic author, Anne Barron, who has persuasively argued that the type of object implicated in a taxonomy of aesthetic species or types looks more like a product of modernism than romanticism: "stable, fixed, closed, self-contained, and autonomous of its context and audience."¹⁴⁷ The modernist sensibility became the target of assault in the 1960s, by artists selecting time-sensitive or ephemeral materials, performance art, conceptual art, deliberate destruction, and art dependent on its environment.¹⁴⁸ Many of these postmodern tendencies, particularly "anti-art" practices and ideas of collective authorship, were discussed by Professor Adler, who defied the scholarly crusade for greater moral rights by arguing that moral rights law "protects and reifies a notion of art that is dead."¹⁴⁹

Professor Adler's argument accurately reflects one version of art history, in which "art" died in the 1960s, having exhausted its aesthetic potential.¹⁵⁰ This Article accounts for art's afterlife. That is, while the materials and events encompassed as "art" have expanded since the era of historical modernism, the core

¹⁴⁵ All of the above examples could be recited here. In addition, see *Pollara*, 344 F.3d at 266 (10 by 30-foot banner); *Martin v. City of Indianapolis*, 192 F.3d 608, 610 (7th Cir. 1999) (large outdoor stainless steel sculpture); *Jackson v. Curators of Univ. of Mo.*, No. 11-4023-CV-C-MJW, 2011 WL 5838432 (W.D. Mo. Nov. 21, 2011) (glass-tiled mosaic on campus grounds), *vacated*, No. 11-4023-CV-C-MJW, 2012 WL 3166654 (W.D. Mo. May 15, 2012); *Scott v. Dixon*, 309 F. Supp. 2d 395, 396–97 (E.D.N.Y. 2004) (40 by 10-foot steel sculpture of a swan weighing 6,000 pounds). The public nature of most disputed works suggests that audience is both an important stake in and perhaps a triggering feature of many VARA conflicts; in terms of reputation, the artist has more to gain by bringing suit than with an object tucked away in a private home, and also has more to lose.

¹⁴⁶ *Kelley*, 635 F.3d at 291 (work comprised of wildflower gardens); *Büchel*, 593 F.3d at 65–66 (large-scale installation comprised of found objects by off-site instruction of artist).

¹⁴⁷ Anne Barron, *Copyright Law and the Claims of Art*, 4 INTELL. PROP. Q. 368, 370 (2002).

¹⁴⁸ See generally THOMAS CROW, *THE RISE OF THE SIXTIES: AMERICAN AND EUROPEAN ART IN THE ERA OF DISSENT* (2005).

¹⁴⁹ Adler, *supra* note 10.

¹⁵⁰ See ARTHUR C. DANTO, *AFTER THE END OF ART: CONTEMPORARY ART AND THE PALE OF HISTORY* 21 (1999) (arguing that modernism reached a historical closure, after which art became "post-historical" or philosophy).

notion of “art” in the broad sense of visual and intellectual creation continues evolving.¹⁵¹ Further, although formerly reliable demarcations have dissolved,¹⁵² a societal matrix comprised of creators, museums, collectors, conservators, critics, and audiences continue to recognize a distinction between art and non-art, just not necessarily with uniformity either within or among these groups.¹⁵³ Thus, while Professor Adler views the law in its collision¹⁵⁴ with contemporary art, this Article presents its entanglement and the resulting chaos of meanings.

Although unique objects persist as art today, VARA's status as copyright law has been strained by their sheer physical size. If intellectual property law has been challenged by public ambivalence in recognizing property boundaries that exist only in law, e.g., illegal downloads of music,¹⁵⁵ VARA cases exacerbate an already counterintuitive proposition. It asks the owner not just to observe an invisible legal boundary, but to affirmatively disregard the exclusive rights that typically flow from a valid

¹⁵¹ My view is thus consistent with developments other than conceptual art or “anti-art,” including those arising from the availability of electronic media, which have influenced artistic practices since VARA's enactment in 1990. Peter Yu has, in this light, appropriately differentiated between the obsolescence of VARA's object-oriented approach in the online world and moral rights “as an institution.” See Yu, *supra* note 77, at 17.

¹⁵² See, e.g., Reza Dibadj, *Postmodernism, Representation, Law*, 29 U. HAW. L. REV. 377, 402 (2007) (“[P]ostmodernism repeatedly questions the clean, reassuring divisions of modernism.”); see also Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 814 (2005) (“Certain current art practice is about breaking down the doors of art's exalted cloister and exploding the definition of art, especially definitions that envision a narrow ‘high’ art.”). Contemporary art has also challenged museum curators and art conservators. See Graham Larkin, *Things Fall Apart*, ARTFORUM, Apr. 2008, at 153, 156 (“Good luck trying to acquire, store, or present vintage performance art, environmental art, Conceptual art, or appropriation art while maintaining a clear distinction between art and context, art and life, art and artifact, art and interpretation, high and low, original and copy, or completion and incompleteness.”).

¹⁵³ That artists continue to produce paintings suggests a non-linear progression.

¹⁵⁴ Adler, *supra* note 10 (“[T]he law is on a collision course with the very art it seeks to defend.”).

¹⁵⁵ See Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 801–02 (2001) (discussing public resistance to recognizing intangible products as property); Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881, 891 (2011) (discussing efforts by motion picture and recording industries to frame file sharing as theft through analogies to stealing tangible property like cars).

sale and lawful possession of the material object. When that object is massive, VARA potentially imperils real property ownership.¹⁵⁶

The potential to burden real property increases when the object's meaning is contingent on its immediate environment, as with site-specific art. Site-specific work poses a formidable challenge to VARA from a property perspective,¹⁵⁷ and art historically, because it rejects autonomy, a condition of modernism.¹⁵⁸ The First Circuit, confronted with changes made to a public sculpture park, categorically excluded site-specific work from VARA's purview.¹⁵⁹ To achieve this result, the court considered real property interests, but struggled in reaching a rationale that comported with the statute's goals, incongruously explaining that its holding "[did] not denigrate the value or importance of site-specific art, which unmistakably enriches our culture and the beauty of our public spaces."¹⁶⁰ If one primary goal of VARA is to preserve art as a cultural and aesthetic good, however, then the court denigrated the value of site-specific art. This Article's point is not to weigh art's value against real property, but to reveal the hierarchy that becomes institutionalized under VARA and its potential asynchrony with cultural values.

A more recent case pressed further, challenging not only spatial impact but the kind of materials that may constitute an art object: The piece was comprised of two flower beds, each nearly the size of a football field, situated in downtown Chicago.¹⁶¹ The district court found that artist Chapman Kelley's

¹⁵⁶ See *supra* text accompanying notes 144–145. As Patty Gerstenblith aptly projected, "[I]n a case of a conflict between the artist's rights and the rights of a real property owner, the latter will still receive greater protection." Gerstenblith, *supra* note 130, at 454.

¹⁵⁷ Francesca Garson, Note, *Before that Artist Came Along, It Was Just a Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 CORNELL J.L. & PUB. POL'Y 203, 205 (2001) (describing the notion that an object could hijack the property on which it stands as "Congress' worst nightmare").

¹⁵⁸ See Barron, *supra* note 147.

¹⁵⁹ *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 131, 142–43 (1st Cir. 2006); cf. Hughes, *supra* note 114, at 25 ("The popular belief that there is a strong boundary between work and framework is apparent in the provisions of the VARA.").

¹⁶⁰ *Phillips*, 459 F.3d at 142–43.

¹⁶¹ *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at *1 (N.D. Ill. Sept. 29, 2008), *aff'd in part and rev'd in part*, 635 F.3d 290 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 380 (2011).

work qualified as a “painting” or “sculpture” under VARA’s definition, but was not copyrightable because it was not sufficiently “original.”¹⁶² Alternately, the court found that the work was not protected under VARA following the First Circuit’s logic: Because it was site-specific.¹⁶³ On appeal, the Seventh Circuit found the work sufficiently original for copyright purposes and declined to adopt a categorical exclusion of site-specific work from VARA; however, the circuit court rejected *Wildflower Works* from VARA’s scope because it lacked the fixity and authorship requirements of copyright.¹⁶⁴ While acknowledging that “the artistic community might classify Kelley’s garden as a work of postmodern conceptual art,”¹⁶⁵ the circuit court found it was “quintessentially a garden,” and thus not copyrightable.¹⁶⁶

Importantly, the circuit court also cast doubt on the district court’s conclusion that *Wildflower Works* was a “painting” or “sculpture” under VARA—a finding that it noted, with incredulity, the defendant had not challenged on appeal.¹⁶⁷ The circuit court underscored VARA’s limiting purpose with respect to section 102(a)(5) of the Copyright Act, which uses adjectives like “pictorial” and “sculptural” that “suggest[] flexibility and breadth in application.”¹⁶⁸ In contrast, VARA’s definition, relying on “nouns,” requires that the work “must actually *be* a ‘painting’ or a ‘sculpture.’” Not metaphorically or by analogy, but *really*.¹⁶⁹ In the circuit court’s aggressively literal interpretation, which explicitly discounted the artist’s intent, an art historian’s

¹⁶² *Id.* at *6 (“Kelley leaves this Court to assume that he is the first person to ever conceive of and express an arrangement of growing wildflowers in ellipse-shaped enclosed area in the manner in which he created his exhibit.”).

¹⁶³ *Id.* at *6–7.

¹⁶⁴ *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 302–03, 306–07 (7th Cir. 2011).

¹⁶⁵ *Id.* at 304.

¹⁶⁶ *Id.* at 306.

¹⁶⁷ *Id.* at 300 (“This is an astonishing omission.”).

¹⁶⁸ *Id.* (citing 17 U.S.C. § 102(a)(5) (2006)).

¹⁶⁹ *Id.* (citing the 17 U.S.C. § 101 definition of a “work of visual art”).

testimony, and the defendant's own marketing of the piece as "living art,"¹⁷⁰ the circuit court relied only on a dictionary defining the terms "painting" and "sculpture."¹⁷¹

2. Art, by Authority of Law

As theorized by Professors Merryman and Sax, the moral rights doctrine tracks, and even serves, art history. America's artistic success justified artists' rights that would likewise protect significant art. Both the *Kelley* and *Phillips* courts, however, interpreted VARA as a more autonomous project, expressing fidelity to legal norms or rigid definitions that conflict with how the art community might value a given work.

This is a significant problem for VARA's preservation agenda. Indeed, the domains of law and art history cannot be disentangled in VARA case law because the statute is predicated on an eminently art historical act: the determination of whether an object receives protection that supersedes the owner's discretion because it is classifiable as art. VARA's most basic inquiry thus affronts a prominent copyright law taboo, what Christine Haight Farley calls the "doctrine of avoidance" of rendering artistic determinations,¹⁷² inspired by Holmes's admonition that entertaining the merits of art is a "dangerous undertaking."¹⁷³

¹⁷⁰ The court found the artist's intent not dispositive and appeared to concur with the district court that the artist's expert (an art historian) was unhelpful. It further stated that the defendant's marketing of the piece as "living art" "add[ed] little to the analysis." *Id.* at 300–01.

¹⁷¹ *Id.* at 301 n.7. The court acknowledged the lower court's regard for the "tension between the law and the evolution of ideas in modern or avant garden art," but concluded, "there's a big difference between avoiding a literalistic approach and embracing one that is infinitely malleable." The court aligned the district court's decision with the latter. *Id.* at 301 (internal quotation marks omitted).

¹⁷² Farley, *supra* note 152, at 815.

¹⁷³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). The passage reads: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke." *Id.* In deference to this famous warning, VARA opinions are occasionally accompanied by disclaimers. *See, e.g.,* *Pollara v. Seymour*, 344 F.3d 265, 271 (2d Cir. 2003) ("We steer clear of an interpretation of VARA that would require courts to assess either the worth of a purported work of visual art, or the worth of the purpose for which the work was created."); *Martin v. City of Indianapolis*, 192 F.3d 608, 610 (7th Cir. 1999) ("We are not art critics, do not pretend to be and do not need to be to

Although commentators have typically focused on the “recognized stature” requirement in VARA’s anti-destruction provision as the ignominious path to qualitative assessments of art by judges, this Article argues, consistent with Professor Farley’s analysis, that the liminal definition of a “work of visual art” is equally qualitative.¹⁷⁴ To identify an object as “art” presupposes a particular meaning and value; “not art” suggests their absence. VARA is a unique site for this nexus of law and art because an artistic determination is not simply required to enforce a right, but is the reason for the right.

Evaluation inheres in classification because the designation “art” is historically and socially informed. For example, even the simple bifurcation in the First Circuit’s site-specific designation—that some works derive meaning from their environment, while others are immune and purely self-contained—elides a more complex process of how artistic meaning is generated. According to the *Phillips* court:

A simple example of a work of integrated art that *is not* site-specific is Marcel Duchamp’s work ‘Bicycle Wheel’, a sculpture integrating a bicycle fork, a bicycle wheel, and a stool in a particular arrangement. However, this sculpture does not integrate its location and could be part of a traveling exhibition of Duchamp’s work without losing its artistic meaning or being destroyed.¹⁷⁵

By explaining site-specific as a function of immobility, the court overlooks the fact that Duchamp’s readymades were entirely context-dependent when first introduced. Duchamp deliberately selected commonly recognized objects to make the

decide this case.”); *id.* at 615 (Manion, C.J., concurring in part and dissenting in part) (“Like my colleagues, I am not an art critic. So I begin with the well-worn adage that one man’s junk is another man’s treasure.”); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994) (“[C]ourts have persistently shunned the role of art critic.”), *aff’d in part and rev’d in part*, 71 F.3d 77 (2d Cir. 1995). *But cf.* Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 249–50 (1998) (arguing that the distinction between judicial reasoning and aesthetic reasoning is illusory).

¹⁷⁴ See Farley, *supra* note 152, at 820–21.

¹⁷⁵ *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 140 n.9 (1st Cir. 2006) (citations omitted).

point that the only distinction from their ordinary status occurred by placement in the sacred realm of the museum.¹⁷⁶ It was not a matter of scale and physical mobility.

The readymade revealed that the seemingly neutral museum was itself a value-charged environment infused with a coded command that the objects contained within be revered as art. The First Circuit's classification stumbles on a similarly presumed neutrality—relying on an art historical canon that commands works by Duchamp constitute art—and again demonstrates the inherently historical contingency of an “objective” taxonomy.¹⁷⁷

Legislators provided a liberal means of responding to VARA's threshold query by advising courts to “use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition.”¹⁷⁸ However, problems arise in the conflict between these two sources, common sense and generally accepted standards, as when the Seventh Circuit preferred the former, severing artistic community standards from its assessment that *Wildflower Works* constituted neither a painting nor a sculpture.¹⁷⁹ An analogous appeal to common sense occurred when the Second Circuit rejected a large mural from VARA's embrace pursuant to the advertising exclusion, based on the work's “objective and evident purpose.”¹⁸⁰ Ironically, in *Bleistein*, the court found that a picture used for advertising should receive the same copyright protection as “fine art.” The opinion expressed concern that judges might exclude advertisements

¹⁷⁶ See MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* 70–71 (2003).

¹⁷⁷ The misalignment of conceptual art and copyright law has received increased attention in recent years. See Charles Cronin, *Dead on the Vine: Living and Conceptual Art and VARA*, 12 VAND. J. ENT. & TECH. L. 209, 212, 214 (2010) (arguing that conceptual art should be categorically excluded from copyright protection).

¹⁷⁸ *Pollara*, 344 F.3d at 269 (quoting H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921) (internal quotation marks omitted); see also *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995); *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526, 533 (S.D.N.Y. 2001).

¹⁷⁹ *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 380 (2011) (“We fully accept that the artistic community might classify Kelley's garden as a work of postmodern conceptual art.”).

¹⁸⁰ *Pollara*, 344 F.3d at 269.

based on elitist privileging of the fine arts,¹⁸¹ the very distinction enshrined in VARA. In this respect, VARA refutes *Bleistein*; it demands that courts privilege fine art above other visual expression.

How do we reconcile these competing policies within copyright law? By copyright standards, VARA is exclusionary. But if VARA's purpose is to privilege a higher order of objects, as suggested in Merryman's cultural evolution theory of moral rights,¹⁸² then the statute is overinclusive and irrationally dictated by medium and convention. As the category of "art" has widened its embrace to forms of popular culture,¹⁸³ what was previously considered "kitsch"¹⁸⁴ has expanded to include the material species that once signified high art. Consider one art critic's review of a portrait of Bill and Melinda Gates, in a column tellingly entitled, "*Is This Art?*"¹⁸⁵ The painting reflects an inveterate art form—portraiture—in a traditional medium, oil on canvas. It would certainly meet the Seventh Circuit's terse definition of the "noun" painting. Yet critic Blake Gopnik cannot imagine the work having a place in "any . . . serious art institution"—not because of mediocre quality, but because the portrait "isn't functioning as art at all."¹⁸⁶

A court would easily read the Gates portrait as a "painting," and thus a work of art protectable under VARA. But reconciling this hypothetical outcome with the exclusions imposed by the First and Seventh Circuits is troubling. By sidelining the art community in defining art under VARA, *Kelley* enforced a doctrinal schism that frustrates the statute's purpose. This is

¹⁸¹ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("A picture is none the less a picture, and none the less a subject of copyright, that it is used for an advertisement.").

¹⁸² See generally *supra* note 70 and accompanying text.

¹⁸³ See, e.g., *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 372 (S.D.N.Y. 1993) (describing litigation based on artist Jeff Koons's use of cartoon character "Odie" as the premise for a sculpture).

¹⁸⁴ See, e.g., CLEMENT GREENBERG, *Avant-Garde and Kitsch*, in *ART AND CULTURE: CRITICAL ESSAYS*, *supra* note 70, at 3, 9–21.

¹⁸⁵ Blake Gopnik, *Is This Art?*, DAILY BEAST (May 18, 2011, 12:22 PM), <http://www.thedailybeast.com/articles/2011/05/18/bill-and-melinda-gates-portrait-is-this-art.html>.

¹⁸⁶ *Id.* He compares the work to a driver's license photograph. However, painting as a form is not a reliable indicator of historical anachronism. Figurative painters like John Currin and Lisa Yuskavage are highly valued in the contemporary art world.

not to suggest that courts have erred in their reasoning,¹⁸⁷ but to point out that in reaching these decisions, they simultaneously construct and implement an artistic hierarchy that has increasingly deviated from that of the community governed.¹⁸⁸ In other words, shouldn't a statute whose goals include preserving contemporary art be influenced by current artistic norms?

B. *The Cultural Object*

Just as the concept of art resists definition, so does "culture";¹⁸⁹ yet, the relationship between the two was made critical to VARA's preservation agenda. The vast role into which Congress cast VARA's narrow class of art objects included "capturing the essence of culture and recording it for future generations."¹⁹⁰ The objects preserved would convey "an accurate account of the culture of our time,"¹⁹¹ testify to national character, and stand "among the greatest of our national treasures."¹⁹²

Conceptualizing VARA as a means of recording American history and protecting national treasures, however, contains several contestable assumptions, and this Article will mention a

¹⁸⁷ The Seventh Circuit, for example, simply adhered to the plain meaning of the statute in holding that a work protected under VARA must also be copyrightable. While the reasoning by which the court judged the work unfit for copyright protection is beyond the scope of this Article, restricting moral rights to copyrightable works has not been viewed as particularly controversial. *See, e.g.*, Roberta Rosenthal Kwall, *Hoisting Originality: A Response*, 20 DEPAUL J. ART TECH. & INTELL. PROP. L. 1, 2 (2009) ("I do not believe the best approach is to apply moral rights to a wider array of works than are currently covered under copyright law.").

¹⁸⁸ *But see* *Brancusi v. United States*, T.D. 43063, 54 Treas. Dec. Int. Rev. 428 (1928), where a Customs Court allowed Brancusi's *Bird in Flight* to enter the United States as "art," and thus without a tariff. The court acknowledged that "under the earlier decisions this importation would have been rejected as a work of art," but deferred to the art world's embrace of modernism and stated: "Whether or not we are in sympathy with these newer ideas and the schools which represent them, we think the fact of their existence and their influence upon the art world as recognized by the courts must be considered." *Id.* at 430–31.

¹⁸⁹ For discussions on culture as an analytic framework of which the law is constitutive, rather than autonomous from, see generally Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141 (2001); Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2011); Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001).

¹⁹⁰ 135 CONG. REC. 12,622 (daily ed. June 20, 1989) (statement of Rep. Markey).

¹⁹¹ *Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 125 (1990) (statement of Weltzin Blix).

¹⁹² *Id.* at 117 (statement of Arnold L. Lehman).

few. First, it assumes that the class of objects defined under VARA reflects contemporary art, and moreover great art—connections that, as shown in the previous section, courts have repudiated. Second, it assumes that contemporary art objects embody American culture—an assumption that many would find incongruous with the notion of an art world as a discrete, insular, and sometimes elitist segment of this nation's culture. Third, it assumes that art preservation inures to the public good—an assumption whose limitations and political mediations became apparent in an array of historic clashes. This section deals with the latter two assumptions, canvassing the conflicts precipitated by a statute aimed at protecting American culture.

1. Cultural Records and National Treasures

"There is truth in objects."¹⁹³

While VARA defines art in its text, its conception of culture is more implicit. Under VARA, culture is reified, condensed into a type of object—a philosophy that again strikes a musicological chord and invokes cultural property theory. The notion of recording American culture by protecting objects in their "authentic" form, for the benefit of the public, sounds not unlike the theme of a museum fundraiser, especially one offering an encyclopedic unfolding of history.¹⁹⁴ The quote from Merryman about objects as truth posits "art" as inclusive of artifacts, a vision of human culture reflected in art and archeological museum collections, where objects are preserved as vestiges of bygone civilizations.¹⁹⁵ Under an object-based mode of

¹⁹³ Merryman, *The Public Interest*, *supra* note 66, at 346.

¹⁹⁴ Conservation has traditionally been viewed as one fundamental purpose of a museum. The language below parallels themes in VARA's legislative history: "Cultural property consists of individual objects, structures, or aggregate collections. It is material which has significance that may be artistic, historical, scientific, religious, or social, and it is an invaluable and irreplaceable legacy that must be preserved for future generations." AMERICAN INSTITUTE FOR CONSERVATION, *Preamble*, CODE OF ETHICS AND GUIDELINES FOR PRACTICE 283 (1994), available at <http://www.conservation-us.org/index.cfm?fuseaction=page.viewPage&PageID=858&d:%5CCCFusionMX7%5Cverity%5CData%5Cdumy.txt>.

¹⁹⁵ See Merryman, *The Public Interest*, *supra* note 66, at 346 (referring to work produced by "the artist or artisan"). The practice of conserving cultural objects in museums has been applied, much more controversially, to living cultures. See generally 3 OBJECTS AND OTHERS: ESSAYS ON MUSEUMS AND MATERIAL CULTURE (George W. Stocking, Jr. ed., 1985); EXHIBITING CULTURES: THE POETICS AND POLITICS OF MUSEUM DISPLAY (Ivan Karp & Steven D. Lavine eds., 1991); JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY,

ascertaining knowledge about culture, the objects are isolated repositories of a definite truth that can be discovered and communicated to the viewer.¹⁹⁶ For all its limitations, this archeological approach encompasses manifold associations, e.g., ritual, religious, and functional, in addition to the Western construct of high art rooted in eighteenth-century Europe.¹⁹⁷

With VARA, the meaning of the objects identified is prefigured; VARA thus informs and constitutes, rather than discovers and reflects, a set of civic values. Moreover, its selection presupposes the broad social relevance of “fine art,” under which the exclusive function of the object is to be preserved and admired for its aesthetic value. Under VARA, preservation is not merely an outcome, but a prerequisite.¹⁹⁸

In the cultural role invoked by legislators, VARA’s objects are also national treasures because they reflect the highest achievements of genius within a universal aesthetic norm—modernism’s distinguishing feature. Moral rights scholars like Merryman discuss great art as if it were the only kind, or at least easily ascertainable and susceptible to definition by consensus.¹⁹⁹ It is this notion of art as not merely an object, but an unspoken discriminatory standard, that sustains the public interest justification of the right to prohibit destruction,²⁰⁰ tacitly reinforced in discourse that references the loss of works by

LITERATURE, AND ART (1988); SALLY PRICE, *PRIMITIVE ART IN CIVILIZED PLACES* (1989).

¹⁹⁶ See Ian Sutherland & Sophia Krzys Acord, *Thinking with Art: From Situated Knowledge to Experiential Knowing*, 6 J. VISUAL ART PRAC. 125, 133 (2007) (discussing the limitations of objects as sources of “objective” knowledge).

¹⁹⁷ See generally MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* (Jonathan Arac ed., 1994) (providing history of modern conception of the arts).

¹⁹⁸ The district court in *Pollara* demonstrated this circularity by requiring the manifest intent that the object was created to be preserved, rather than used for advertising, as a threshold. See *Pollara v. Seymour*, 206 F. Supp. 2d 333, 336–37 (N.D.N.Y. 2002), *aff’d*, 344 F.3d 265 (2d Cir. 2003). According to the court, a contrary result “would not advance the values protected by VARA.” *Id.* at 337 n.6.

¹⁹⁹ A more utopian view suggests that all art should be preserved. See Liemer, *supra* note 10, at 51 (arguing that right of integrity “avoids value judgments” as to quality because a “society that recognizes this right recognizes the value of all creative efforts”). Both rhetorical stances avoid uncomfortable line-drawing because they frame the doctrine solely in terms of whether “art,” as an undifferentiated category, is valued by society.

²⁰⁰ *Id.* at 52 (describing how unless destruction is prohibited, “[t]he public’s interest in the work also goes unprotected”).

renowned artists like Picasso. These views implicitly deny the influence of culture in determining, as opposed to merely reflecting, the winners.²⁰¹

The “recognized stature” standard in the anti-destruction provision is VARA’s proxy for national treasures, i.e., high cultural value. Although recognized stature has been criticized for obstructing a broader allocation of moral rights,²⁰² the more telling cultural exclusions occur earlier, in the objects that fail to qualify for consideration: not just advertising, but popular forms of entertainment like motion pictures and videographic expression.²⁰³ Mass media and mass culture—emblematic attributes of American identity—were excised from VARA’s embrace, rendering high culture as the sole exponent of national heritage. Ultimately, VARA does not necessarily protect artifacts that signify or embody culture. Rather, it protects a class of objects that fit a prescribed cultural role.

²⁰¹ See, e.g., LINDA NOCHLIN, *Why Have There Been No Great Women Artists?*, in WOMEN, ART, AND POWER 145, 152–55 (1988) (pointing out latent cultural biases that inhere in professional norms, including conception of “Great Artist”). Trends are one indication of cultural influences. See, e.g., Storr, *supra* note 141, at 31 (noting arc of burgeoning interest in Frieda Kahlo in 1930s, slump in 1950s and 60s, and now exorbitant prices); Jeffrey Weiss, *9 Minutes 45 Seconds*, in COLLECTING THE NEW, *supra* note 140, at 41, 45 (acknowledging political incentives in National Gallery’s efforts to collect Abstract Expressionism in the 1970s and 80s); Georgina Adam, *The Lure of the East*, ART NEWSPAPER, Jan. 2011, at 31, 31 (noting recent revival of interest in nineteenth-century Orientalism, following period of political incorrectness).

²⁰² See Robinson, *supra* note 8, at 1964, 1971 (proposing removal of recognized stature requirement). Contrary to this theory, courts have shown some willingness to apply the standard flexibly—a willingness that suggests a desire to translate the idea of art into values that resonate with a broader theory of culture. *E.g.*, Hanrahan v. Ramirez, No. 2:97-CV-7470 RAP RC, 1998 WL 34369997, *4 (C.D. Cal. June 3, 1998) (finding mural painted by artist and 300 kids from economically depressed, racially diverse area had recognized stature, and finding harm to the artist’s reputation “as one who can make this kind of community project work”); Carter v. Helmsley-Spear, 861 F. Supp. 303, 325 (S.D.N.Y. 1994) (citing deference to “art experts, the art community, or society in general”); *cf.* Robinson, *supra* note 8, at 1959–61 (noting frequency of litigation over murals valued in California Chicano communities since VARA).

²⁰³ I refer to cultural products that have some visual component, and thus exclude other copyrightable expressions arguably more associated with American culture, like certain musical genres.

2. The Politics of Preservation

“The integrity right helps preserve artworks intact for all of us to enjoy.”²⁰⁴

This section probes the conflicting impulses that belie the monolithic cultural role assigned by VARA to art objects, wherein art preservation is always a public benefit and an overture of social harmony.²⁰⁵

a. *The Imperfect Moment*

As discussed, VARA’s taxonomy recalls modernism by implying the object’s autonomous, self-contained aesthetic existence. Professor Sax, arguing for greater regulation and protection of cultural treasures, similarly views recognition of the art object’s intrinsic aesthetic value critical to cultural preservation policy because it supersedes the political or religious purpose that might trigger the object’s iconoclastic demise. According to Professor Sax, the aesthetic priority represents “the great triumph of the decontextualization of art.”²⁰⁶

To illustrate, he relays an incident from the 1930s, when the Rockefellers discovered that Diego Rivera’s mural, commissioned for an entranceway in Rockefeller Center, included a portrait of Lenin. To their request that he paint over Lenin’s face, Rivera responded that he would prefer destruction of the work in its entirety. The Rockefellers, after paying Rivera in full, had the mural destroyed, an act which Rivera called “cultural vandalism.” According to Professor Sax, “The Rockefellers can only be seen as ‘cultural vandals’ if the community’s interest in preserving the achievements of genius is understood to be more

²⁰⁴ *Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 82 (1990) (statement of Prof. Jane Ginsburg).

²⁰⁵ See, e.g., Liemer, *supra* note 10, at 56–57 (“Experiencing others’ art gives a greater sense of the other and often facilitates an understanding of and sensitivity to those who view the world differently.”); Ong, *supra* note 9, at 309 (“[T]he communicative function that the integrity right serves towards the cultivation of a tolerant, respectful and culturally enlightened community.”).

²⁰⁶ SAX, *supra* note 56, at 18. Justin Hughes assumes the modernist approach by suggesting that western art has been characterized by a progression toward decontextualization, beginning with context-dependent religious art and leading to modern art, film, and the internet. Hughes, *supra* note 114, at 25 (“All of these social and artistic developments have given rise to a popular belief that a work, by itself, embodies meaning.”).

important than its role in advancing the political or religious agenda of the owner or patron.”²⁰⁷ That, he says, is the position taken by “the modern world.”²⁰⁸

It is probably fairer to state that modern America has taken this position with historical hindsight.²⁰⁹ Although certainly the destruction of Rivera’s mural was tragic, Professor Sax’s view is facilitated by the neutralizing power of historical distance, both in terms of a changed political environment and retrospective consensus as to Rivera’s contribution to art history.²¹⁰ Important interests, including those implied by Rivera’s reaction, seem compromised by a theory that renders the Rockefellers insufficiently appreciative of the object’s aesthetic value.²¹¹

The impossibility of filtering contemporaneous associations, of somehow placing one’s vantage outside of history to appreciate an object’s “inherent” aesthetic attributes is exemplified in the culture wars of the 1990s, precipitated by the Corcoran Gallery’s cancellation of an exhibition of Robert Mapplethorpe’s homoerotic photographs.²¹² In the context of the visual arts, the culture wars also demonstrated that like objects, acts of destruction have an expressive value.²¹³ Just one month prior to Representative Markey’s pronouncement that works by American artists should be preserved because they capture and record “the essence of culture.”²¹⁴ Senator Alphonse D’Amato famously tore up a copy

²⁰⁷ SAX, *supra* note 56, at 17–18.

²⁰⁸ *Id.* at 18.

²⁰⁹ Some would argue that this view has also justified a colonialist approach to non-Western property because it denies meanings invested by the source culture. See Patricia Failing, *The Case of Dismembered Masterpieces*, ARTNEWS, Sept. 1980, at 68 (noting that practice of breaking up and decontextualizing objects is often associated with the importation of cultural artifacts from Third World countries).

²¹⁰ As Professor Mezey has observed with respect to the broader realm of cultural property, “[p]reservationism, for all its importance, values stasis, and therefore is much better suited to dead cultures than to living ones.” Mezey, *supra* note 62, at 2013.

²¹¹ Prior to having the mural destroyed, Nelson Rockefeller attempted to donate it to the Museum of Modern Art, but this plan was rejected by the museum’s trustees. See SAX, *supra* note 56, at 14–15.

²¹² The Corcoran Gallery had agreed to host an exhibition of the artist’s photographs, *The Perfect Moment*. Upon learning that the exhibition included explicit, homoerotic works, and two images of naked children, it canceled. The Washington Project for the Arts ultimately displayed the images, to huge crowds, from July 21 to August 18, 1989.

²¹³ For an interesting discussion on the expressive value of destruction, see Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 824–30 (2005).

²¹⁴ 135 CONG. REC. E2227 (daily ed. June 20, 1989) (statement of Rep. Markey).

of Andres Serrano's controversial work, *Piss Christ*, on the floor of the Senate.²¹⁵ D'Amato's gesture offers a potent counter-symbolism to the *Trois Femmes* incident. Moreover, the former—targeting work by an American artist—is arguably more representative of our national culture in the 1990s, one characterized by dissent and discomfort with a diverse cultural landscape. The juxtaposition of VARA's enactment with this milieu reveals a more oppositional stance with culture than anticipated.

b. The Democracy of Destruction

"This is a day for the people to rejoice, because now the plaza returns rightfully to the people."²¹⁶

An art object need not manifest a socially divisive message for art preservation to assume a political character. This is partly because contemporary art is not just another category of American artifacts, alongside historical monuments like the Liberty Bell; it is a league often perceived as un-American and elitist. While museums have long contended with the gap between contemporary art and a broad public audience,²¹⁷ VARA's public is involuntary.

Although it has been repeatedly dissected in law and art historical literature, the highly publicized, pre-VARA controversy in 1986, involving Richard Serra and his seventy-three-ton steel "anti-monument," *Tilted Arc*, remains a compelling illustration of the intense hostility that can mount over a public art work absent overt political content. It depicts the more extreme ends

²¹⁵ D'Amato's conduct occurred on May 18, 1989. 135 CONG. REC. S5594 (daily ed. May 18, 1989) (statement of Sen. D'Amato); *Andres Serrano: Piss Christ*, CHRISTIE'S AUCTION HOUSE, http://www.christies.com/LotFinder/lot_details.aspx?intObjectID=5070403 (last visited Oct. 10, 2013).

²¹⁶ William Diamond, regional administrator of the federal government's Art-in-Architecture Program, speaking on the day that Richard Serra's commissioned abstract sculpture, *Tilted Arc*, was removed from New York's Federal Plaza. *Maquette for Tilted Arc*, SMITHSONIAN AMERICAN ART MUSEUM AND THE RENWICK GALLERY, <http://americanart.si.edu/collections/search/artwork/?id=22145> (last visited Oct. 10, 2013).

²¹⁷ See generally Carl Andre et al., *The Role of the Artist in Today's Society*, 34 ART J. 327 (1975) (discussing museum symposium addressing gap between art and public). Modern museum audiences in the United States typically consist of persons with high levels of formal education. Kreidler, *supra* note 39, at 157 ("This point has been confirmed by virtually all surveys of performing arts and museum audiences over the past three decades.").

of how a seemingly neutral, literally conservative, decision to preserve can ignite latent tensions between the artistic community and the public.

In brief, Serra had been commissioned by the General Services Administration ("GSA") of the federal government to design a sculpture under its Art-in-Architecture program.²¹⁸ Serra's massive, site-specific arc²¹⁹ was installed at the center of Federal Plaza and greeted with immediate hostility by employees who demanded its removal.²²⁰ When GSA offered to move the work to a new venue, Serra claimed that relocation was tantamount to destruction and brought suit.²²¹ Spectators described the hearings as an intensely antagonistic confrontation between an elitist art world and "the people."²²² In the end, *Tilted Arc* was destroyed.

Although the quote above indicates that "the people" won, *Tilted Arc*, like most public sculpture, was defended on grounds of democracy and public access.²²³ Which public represents American culture, when, and for how long? The final irony of *Tilted Arc* is that although it was destroyed decades ago, we still

²¹⁸ For a detailed discussion of GSA's Art-in-Architecture program—whose policy rationale was exclusively aesthetic enrichment—and comparison with other federal arts programs, see Judith Huggins Balfe, *The Process of Commissioning Public Sculpture: "Due" or "Duel"*, in AMERICA'S COMMITMENT TO CULTURE: GOVERNMENT AND THE ARTS, *supra* note 44, at 189, 189–204.

²¹⁹ Unlike site-specific art that attempted to complement its environment, Serra's arc reflected his ambition that the site "be understood primarily as a function of the sculpture." Thomas Crow, *Site-Specific Art: The Strong and the Weak*, in MODERN ART IN THE COMMON CULTURE 131, 146 (1996) (quoting Richard Serra).

²²⁰ See Robert Storr, *"Tilted Arc": Enemy of the People?*, ART IN AMERICA, Sept. 1980, at 91, 91–92.

²²¹ *Serra v. U.S. Gen. Servs. Admin.*, 667 F. Supp. 1042, 1045 (S.D.N.Y. 1987), *aff'd*, 847 F.2d 1045 (2d Cir. 1988).

²²² See Crow, *supra* note 219, at 148–50; *cf.* *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1047 (2d Cir. 1988) ("[Tilted Arc] is now coated with what the artist refers to as 'a golden amber patina' and what the sculpture's critics refer to as 'rust.'").

²²³ The dismemberment of art has likewise been defended on grounds of cultural democracy, at least with respect to non-Western art. See, e.g., Michael Kimmelman, *Who Draws the Borders of Culture?*, N.Y. TIMES, May 9, 2010, at AR1 (arguing that the "countless altars and other works of art [that] have been split up and dispersed among private collectors and museums here and there" has been "democratizing").

talk about it, in law and in art history. *Tilted Arc*, probably Serra's best known sculpture, derived monumental, enduring power from and in its absence.²²⁴

The examples provided ultimately speak neither for the public benefit of preservation nor that of destruction. Rather, they signify the mutability and variance of symbolism associated with art objects, and they highlight that the modern approach to preservation implicit in VARA is not simply a means of protecting culture but a distinct cultural value in itself.

C. *The Transcendent Object*

"I wish I was a hedge fund manager. Or at least I wish I knew what hedge fund managers do."²²⁵

"They collect art."²²⁶

This section looks at the consequences of investing an object with transcendence, that is, valuing it as something other than a commodity, as theorized under VARA's right of integrity. Under VARA, the anti-commodity status of art is intimately connected to the Romantic author archetype and the creative act.²²⁷ But the transcendent object is also a social role with remarkable traction: Objects may be deemed "priceless" or universalized as belonging to no one,²²⁸ even though we know that works sell at auction and have owners. This section examines the implications of these conflicting meanings for the moral rights doctrine and for its relation to copyright law and considers how destruction fits into this picture.

²²⁴ See Crow, *supra* note 219, at 150 (arguing that *Tilted Arc* controversy, as opposed to the object, instigated important debates that "might have been competently put aside had it gone on existing").

²²⁵ GEOFF DYER, *JEFF IN VENICE, DEATH IN VARANASI* 89 (2009).

²²⁶ *Id.*

²²⁷ Moral rights theory suggests that the object is almost a living thing, like a child. KWALL, *supra* note 7, at 13 (discussing parental metaphor as reflecting intrinsic dimension of creativity); Adler, *supra* note 10, at 269; *see also* Deborah Solomon, *Our Most Notorious Sculptor*, N.Y. TIMES, Oct. 8, 1989, § 6, at 39 (reporting that Serra and his wife speak of *Tilted Arc* "as if it were a child they lost").

²²⁸ See 133 CONG. REC. E4257 (daily ed. Oct. 29, 1987) (statement of Rep. Markey) ("[Works of art] belong to no one because they belong to all of us.").

1. The Moral of Creation

To justify incorporating moral rights into the Copyright Act, VARA's supporters rendered art preservation utilitarian. They suggested that the climate of respect and honor created by preserving contemporary art would motivate further creation, analogous to, yet qualitatively distinct from, the economic reward presumably inspiring other types of authors.²²⁹ This theory relies on two false binaries: (1) art versus money and (2) preservation versus destruction.

a. *Incentives and Requirements*

In the destruction paradigm based on Picasso's *Trois Femmes*, the profit-motivated entrepreneur is the bad guy.²³⁰ This seems a remarkable nemesis, especially in the late 1980s.²³¹ Art has been connected to a market ever since formal patronage declined and the dealer system emerged in the nineteenth century. Although this Article shares the opinion that artists are not motivated by profits,²³² they have long been compelled to navigate the mundane business of selling their works. Indeed, the waning reliability of secure commissions and the absence of a socially integrated role helped create the conditions that resulted in the Romantic author, starving and alone, opposed to banal

²²⁹ See *supra* notes 84–85 and accompanying text (discussing utilitarian justification for moral rights advanced by legislators). This logic has been perpetuated by courts and commentators alike. See, e.g., *Mass. Museum of Contemporary Art Found., Inc., v. Büchel*, 593 F.3d 38, 49 (1st Cir. 2010) (acknowledging one purpose of VARA was to “encourage the creation of . . . [fine] art”); Liemer, *supra* note 10, at 44 (“Recognizing moral rights is one way a society can encourage artists to create.”).

²³⁰ See *supra* notes 94–96 and accompanying text.

²³¹ See, e.g., 133 CONG. REC. E4257 (daily ed. Oct. 29, 1987) (statement of Rep. Markey) (“[A]rt . . . is more than a piece of property [I]t is even more than a valuable commodity with one of the highest rates of return on the market. Works of art are much more than that.”).

²³² KWALL, *supra* note 7, at 19 (“[C]reativity is spurred largely by incentives that are noneconomic in nature.”). See generally Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007) (critiquing both rights-based and economic approaches to copyright law as impoverished means of theorizing creativity); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009) (critiquing theory of external incentives to creativity).

social conventions.²³³ Although the paradoxical dependency of art upon money is everywhere observed, this oppositional trope persists.²³⁴

VARA both denies the economic side of art and attempts to redress it. Although moral rights are presented as nonpecuniary²³⁵ and often discussed in quasi-spiritual terms, VARA is also rationalized as a means for visual artists to increase bargaining power over purchasers²³⁶ and offers money damages.²³⁷ Recall that the VARA bill was partly defended as a means for visual artists—meaning creators of unique objects—to obtain parity with other authors better served under the copyright model.²³⁸ But as a statute that purports to provide only noneconomic rights, VARA clashes with, rather than supplements, the dominant culture of copyright law. Although copyright law has been criticized for overrelying on economic theory,²³⁹ the reverse polarization of art and money has also frustrated the marriage of moral rights with copyright law; instead, VARA assumes the somewhat absurd stance of purporting to incentivize transcendence.

As much as the Picasso paradigm appears to chastise the destructive taint of money, its subtext honors the economic value of art. To wit, the *Trois Femmes* example is effectively devoid of an artist; its outrageousness is derived from the loss of an object highly valued by the market—due to the artist’s reputation—not

²³³ See JANET WOLFF, *THE SOCIAL PRODUCTION OF ART* 10–12 (2d ed. 1993).

²³⁴ See, e.g., David Colman, *Rachel Feinstein and John Currin, Their Own Best Creations*, N.Y. TIMES, Mar. 13, 2011, ST1 (discussing potential harm to reputation and credibility when artists lead relatively glamorous lifestyles).

²³⁵ See Yu, *supra* note 77, at 20 (“[T]he protection of moral rights is not about pecuniary compensation.”); Ong, *supra* note 9, at 312 (critiquing economic justifications of moral rights as counterproductive).

²³⁶ E.g., KWALL, *supra* note 7, at 33 (altering the bargaining power between author and user is “the very purpose of moral rights laws”); Ong, *supra* note 9, at 302.

²³⁷ See, e.g., *Martin v. City of Indianapolis*, 192 F.3d 608, 614 (7th Cir. 1999) (noting the court’s reluctance to impose full statutory damages despite violation, reasoning that destructive conduct could not have been “wilful,” under 17 U.S.C. § 504(c)(2) because defendant had no knowledge of VARA rights).

²³⁸ See Hansmann & Santilli, *supra* note 22, at 100 (arguing on economic grounds that copyright law already functions like a right of integrity with respect to literary works).

²³⁹ See, e.g., Tushnet, *supra* note 232, at 517–18 (“What empirical evidence exists does not engender confidence that increases in copyright protection spur creativity.”).

the artist's diminished dignity. VARA plaintiffs seek art preservation based on the latter, but without the former, the task is more arduous.

b. Preservationism and Destructionism

Contrary to the model offered by legislators, in which preservation begets creation, Amy Adler has argued that VARA is harmful to artists because it is based on an outdated conception of art that "artists have been rebelling against for the last forty years."²⁴⁰ Preservation, she argues, thwarts destruction and thereby stifles creation: "Inherent in the idea of the avant-garde, valorized by modernism, is the idea of continually breaking with the past. Modernism depended on shattering tradition; the progress of art entailed a kind of metaphorical iconoclasm."²⁴¹

Because she views destruction as essential to artistic progress, Professor Adler contends that "moral rights laws endanger art in the name of protecting it."²⁴²

One example of the many that Professor Adler uses to demonstrate the importance of destruction to creative innovation is *Erased de Kooning Drawing*, from 1953—Rauschenberg's celebrated attack by erasure on a work by the eponymous then-reigning master of painting and quintessential Abstract Expressionist.²⁴³ In the view of many, the unknown Rauschenberg destroyed de Kooning's art to advance from the oppressive hegemony of Abstract Expressionism. Adler positions *Erased de Kooning* as a "scandalous assault on a particular conception of 'art,' " the one embodied in VARA.²⁴⁴

In one respect it was, but this Article offers the obvious corollary. *Erased de Kooning* now hangs in the San Francisco Museum of Modern Art and is revered as the very conception of "art" that it arguably decimated. Without discrediting Rauschenberg's personal convictions or the work's performative impact,²⁴⁵ the absorption of the work and the artist into the

²⁴⁰ Adler, *supra* note 10.

²⁴¹ *Id.* at 265, 288.

²⁴² *Id.* at 265.

²⁴³ *Id.* at 283. Significantly, de Kooning willingly provided the drawing for this event. *Id.* at 283 n.111.

²⁴⁴ *Id.* at 283.

²⁴⁵ *Erased de Kooning*, while not unimportant, did not single-handedly devastate Abstract Expressionism; as with most art historical developments, the

established canon bespeaks a cycle rather than an end. Rauschenberg may have destroyed de Kooning's sovereignty, but not the kingdom.²⁴⁶

Rauschenberg is not the only artist to take a counter-cultural stance, only to be venerated by the cultural mainstream.²⁴⁷ While today's conceptual impulse can be traced to Duchamp, he began signing his readymades in the 1960s, acceding to the institutional values of rarity, authorship, and authenticity that his readymades supposedly mocked. Defiance of the art establishment often generates a notoriety that ultimately reaffirms the attacked domain.²⁴⁸ Thus, even as he exposed the "white cube," Duchamp also demonstrated its capacity to absorb assault.²⁴⁹ Even today's artists who work in the conceptual tradition of Duchamp are doing just that: perpetuating the oxymoron of an "avant garde tradition." In sum, rather than being incompatible with the Romantic author, the artist-destroyer epitomizes it.

process eludes definitive boundaries. See, e.g., CROW, *supra* note 148, at 18–19 (discussing significance of Jasper Johns's 1958 exhibition). See generally JOSHUA SHANNON, *THE DISAPPEARANCE OF OBJECTS: NEW YORK ART AND THE RISE OF THE POSTMODERN CITY* (2009) (characterizing both Rauschenberg and Jasper Johns as late modernists, rather than incipient postmodernists).

²⁴⁶ A similar paradox has been ascribed to Andy Warhol; Warhol, often credited with ending "art," devoted his life to making "art." See Louis Menand, *Top of the Pops*, NEW YORKER, Jan. 11, 2010, at 57, 63. In addition, Rauschenberg does not easily serve as the exemplar of creative destruction. See Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226 DAB, 2003 WL 21403333, at *6 n.7 (S.D.N.Y. June 17, 2003) (listing Rauschenberg among artists seeking to preserve Soho artwork by another artist). Rauschenberg also had a moral rights action pending at the time of his death, based on attribution rights.

²⁴⁷ Adler, *supra* note 10, at 283 (noting that Abstract Expressionism, initially the avant-garde, was effectively institutionalized as the prevailing art form at the time of Rauschenberg's *Erased de Kooning*).

²⁴⁸ See, e.g., Colman, *supra* note 234 (explaining that contemporary art star John Currin became noticed in the 1990s with a show consisting of racy depictions of middle-aged, upper-middle-class women and a *Village Voice* review by Kim Levin imploring readers to boycott it); Calvin Tomkins, *Lifting the Veil*, NEW YORKER, Jan. 28, 2008, at 58, 62–63 (quoting Currin, "thank God there was that really bad review in the *Village Voice* . . . which got me some attention."). Earlier examples abound. See, e.g., Solomon, *supra* note 227 (describing Richard Serra as "risen from the ranks of the 1960's avant-garde into the annals of art history"); see also Symposium, *The Role of the Artist in Today's Society*, 34 ART J. 327, 329 (1975) ("[T]he easiest way to get into the art system is to appear to be working outside it or against it.").

²⁴⁹ See, e.g., Julia Bryan-Wilson, *Sounding the Fury*, ARTFORUM, Jan. 2008, at 95, 95 (noting that Dan Graham's property-resistant dematerialized conceptual art "has proved no escape from the rapaciousness of the market").

Modernist destruction was primarily metaphorical, whereas postmodernism made it real. Professor Adler does not draw a hard line between the two,²⁵⁰ but the difference is crucial because VARA only interferes with the latter.²⁵¹ To oppose moral rights on grounds that the doctrine stifles creativity implies that the literal destruction of single-copy, original works by one's living contemporaries is a necessary condition of innovation or superior mode of artistic practice—a theory which, if true, seems creatively stalled.²⁵² The theory also appears dissociated from the prevailing artistic practice of appropriating widely-available copies, rather than original works of art. Nor does creative destruction account for VARA case law, which suggests a less interesting yet still relevant truth: that sometimes destruction is just destruction.²⁵³ Perhaps the locked horns of the destruction-preservation binary, like that of art-money, is too reductionist. Rather, both impulses inform the practices and conceptualization of art, and neither one alone can sustain a coherent thesis of cultural progress, a dynamic process in which traditions are continually reenacted, broken, created, and reinterpreted.

2. The Vanishing Point

Perhaps the least anticipated yet most critical challenge posed by VARA's anti-destruction provision is its inability to account for cultural obsolescence. That is, an essential premise of the *Trois Femmes* example, likewise apparent in Buffet's

²⁵⁰ Picasso, for example, whom Adler quotes as saying, "A picture is a sum of its destructions," Adler, *supra* note 10, at 263, arguably annihilated traditional artistic practices, but he did not literally destroy the works of his peers—aside from *Erased de Kooning*, neither did Rauschenberg. Indeed, Picasso personifies the author-genius construct that many postmodern artists have challenged.

²⁵¹ Moral rights law flourished in turn-of-the-century France, concurrently with its avant-garde modernism. The impressionist Camille Pissarro, for example, spoke of "burn[ing] down the Louvre" in defiance of all artistic tradition. LINDA NOCHLIN, *THE POLITICS OF VISION: ESSAYS ON NINETEENTH-CENTURY ART AND SOCIETY* 62 (1st ed. 1989). Destruction as an artistic theme remains compatible with museum culture; for example, the *Damage Control: Art and Destruction Since 1950* Exhibit at Hirshorn Museum on display until May 26, 2014.

²⁵² Professor Adler acknowledges this conflict, writing, "I am wary of blithely etching in stone a vision of art, reflecting the current moment, that is doomed to become just as outmoded as the romantic concepts underlying moral rights." Adler, *supra* note 10, at 299.

²⁵³ See, e.g., *supra* text accompanying notes 133–135 (explaining that Büchel's bid to the court for destruction, for example, was not in the name of artistic creation).

refrigerator case, is commercial demand for the artwork in its exploited form. Even in the *Erased de Kooning* example, as its title indicates, a continued association with de Kooning is central to the work's meaning. *Erased de Kooning* appears to suggest an alternate view of destruction than the Picasso paradigm, i.e., destruction as creation, but the paradigms are analogously contingent on the legible presence of iconic artists, albeit for differing purposes. These "destroyed" works effectively preserve and depend upon the inviolability of the original artist's reputation, still cognizable and carried into the new creation. They are both annihilation and homage.

The anti-destruction case law offers the reverse: Instead of saving highly valued art from commercial exploitation, artists have invoked VARA to either compel value or redress inadequate value. Specifically, in a typical VARA case, the owners want to destroy, abandon, or rid themselves of the work, not profit from the resale or redesign of smaller components. In *Carter v. Helmsley-Spear*, for example, the new owners of the building containing plaintiffs' installation simply wanted it gone.²⁵⁴ In *Martin v. City of Indianapolis*, the City demolished the plaintiff's twenty-by-forty foot outdoor metal sculpture; there was no resale attempt.²⁵⁵ In *Pollara v. Seymour*, the painted banner was crumpled, torn, and discarded by city employees.²⁵⁶

Accordingly, examples such as Buffet's refrigerator and *Erased de Kooning* bear little resemblance to VARA's litigation history, where a court usually must decide whether a property owner should be compelled to preserve intact a work by a lesser-known artist with no ulterior use to the owner—including selling the work—and which may impinge on other uses of the property it inhabits. Notably, with the exception of *Büchel*, which was atypical in that the VARA defendant was a museum, even the mutilation cases have typically not involved either creative or commercial exploitation.²⁵⁷ Rather, VARA integrity cases are

²⁵⁴ *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

²⁵⁵ *Martin v. City of Indianapolis*, 192 F.3d 608, 611 (7th Cir. 1999).

²⁵⁶ *Pollara v. Seymour*, 344 F.3d 265, 267 (2d Cir. 2003).

²⁵⁷ Perhaps because there is no definitive test for distinguishing destruction from mutilation, it is difficult to identify a consistent rationale for the plaintiff's choice of theory. In *Kelley*, the artist sued under the mutilation provision only, though presumably he could have likewise pleaded the case as destruction. See *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 295 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 380 (2011). The artist may also bring suit under both the mutilation and destruction

sustained by works mutilated or destroyed because of their perceived lack of exploitability. They are all annihilation, no homage.

Some scholars have suggested that a principal reason for limiting moral rights to works of fine art is that these objects are typically acquired for their aesthetic rather than utilitarian value and thus are less likely to require modification to perform their function.²⁵⁸ That may be true, but this theory splinters as applied to the anti-destruction provision, which invites litigation on a highly likely outcome of purchasing art for aesthetic value: that taste will change, such that the objects no longer have a function to perform at all. As Dario Gamboni points out, speaking more generally about cultural artifacts, "it is their normal fate to disappear."²⁵⁹ VARA is thus available as a protest of accelerated obsolescence.²⁶⁰ Moreover, as individual specimens of an art preservation mandate, VARA disputes are always a worst-case scenario in that only works undesired by their owners are adjudicated for privileged status.²⁶¹

provisions. *See Pollara*, 344 F.3d at 269. One pre-VARA mutilation example frequently cited in moral rights literature involved a large mobile by the sculptor Alexander Calder, donated to the Pittsburgh airport. The airport had the mobile repainted in green and gold (the colors of Allegheny County) and soldered parts to prevent motion. Calder sought to have the work restored to its original state in the latter two decades of his life, but was unsuccessful. Two years after his death in 1976, however, the airport agreed to restore the sculpture. *See Hansmann & Santilli*, *supra* note 22, at 100. At the time Calder fought his battle, he did not own the copyright due to the "Pushman doctrine," by which copyright was presumptively transferred with the physical object, a doctrine in effect until the 1976 Copyright Act. *Id.* at 115. Hansmann and Santilli suggest that had Calder retained the copyright, he could theoretically have argued that the airport's reconfiguration and repainting of the sculpture was a derivative work; however, case law of this nature is undeveloped. *See id.* *But see* *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997) (rejecting derivative work argument as a potential "back door" to "an extraordinarily broad version of authors' moral rights").

²⁵⁸ KWALL, *supra* note 7, at 69; Hansmann & Santilli, *supra* note 22, at 103–04.

²⁵⁹ DARIO GAMBONI, *THE DESTRUCTION OF ART: ICONOCLASM AND VANDALISM SINCE THE FRENCH REVOLUTION* 25 (2007).

²⁶⁰ In other words, artists have invoked VARA on strictly preservationist grounds, rather than for the traditional moral rights harm of misrepresenting the artist's vision. Professor Sax noted a similar trend under the California statute. SAX, *supra* note 56, at 26–32 (remarking that the law was invoked "in almost every instance to protect works against destruction").

²⁶¹ *See* Hansmann & Santilli, *supra* note 22, at 111 (noting that anti-destruction provision will almost always be invoked when a work is not highly valued, "since rarely would the owner of a work of 'recognized stature' have an incentive to destroy it").

This potential rupture between artist and public preference sharply contrasts copyright's utilitarian model, where consumer demand determines copyright value. A novelist, musician, or filmmaker may produce a great work that lacks an audience, but copyright law offers nothing to keep the unpopular in circulation; copyright law controls rights to, rather than helps create, the work's public value.²⁶² Because it defines art yet lacks correlation with use, VARA's anti-destruction provision upends the copyright progress model and denies its own cultural context.

IV. RECONFIGURATION: A POST-OBJECT PROPOSITION

VARA is a flawed moral rights statute, but the fix is not simply to expand its reach; rather, American moral rights law needs to be reconceptualized at its foundations. That the author, rather than the physical object, should be the primary focus of moral rights law is self-evident. Yet, as demonstrated, that priority does not reflect the development of moral rights in American scholarship; it was not the dominant rationale for enacting VARA; it is not evidenced in the definitions, exclusions, and operative provisions of VARA; and despite the boilerplate rhetoric dispensed by courts, it does not reflect their concerns. Instead, the goal of identifying and preserving unique objects of art eclipsed the author and confounded the doctrine.

Moral rights theory cannot exclusively reside in a narrow class of physical objects to make sense as copyright law, as rights of personality, or as arts policy. As moral rights law, VARA's inclusion of an anti-destruction provision was technically expansive, even compared to civil law jurisdictions. However, underwriting moral rights with a social policy tied to art preservation has exacted a high tax on authorship concerns, while obscuring important but distinct issues of copyright

²⁶² I do not suggest that the copyright reward system is normatively ideal, but only that it provides a direct means of quantifying social value. Notably, this problem would not necessarily arise in a law prohibiting the modification of reproducible media, because demand inheres in the violation. *See, e.g.,* *Preminger v. Columbia Pictures Corp.*, 49 Misc. 2d 363, 366, 372, 267 N.Y.S.2d 594, 599, 603 (Sup. Ct. N.Y. Cnty. 1966), *aff'd*, 25 A.D.2d 830, 269 N.Y.S.2d 913 (1st Dep't), *aff'd*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80; *supra* note 128 and accompanying text.

protection for visual artists. The focus on objects also misses the mark in the art community, establishing an autonomous hierarchy that renders VARA both under- and over-inclusive.

We need to elucidate the goals of moral rights beyond the preservation of tangible artifacts. Doing so requires, initially, segregating the issue of "artists' rights," which as a synonym for moral rights has proven detrimental to visual artists while short-circuiting the doctrine's reach to other authors. Visual artists currently appear privileged, dissembling how stringently the statute is implemented in accordance with its archaic taxonomy. Moreover, framing the moral rights doctrine as a set of "privileges" or "special rights," as has been facilitated by isolating a particular type of creator, undermines its legitimacy.²⁶³ If creators of unique objects are ill-served under copyright law, these concerns should be addressed as copyright law. Moral rights should be addressed as a matter of authorship. It is only from a well-defined foundation of authorial dignity as a legitimate copyright interest that moral rights can gain traction in the law and resist marginalization as a niche issue. From this point, legislators could fashion rights appropriate to the needs of different creators.

This foundation would require flexibility, attuned to contemporary theories of creativity and culture. Moral rights discourse has been so colonized with overblown, antiquated imagery of the Romantic author that the entire doctrine is easy to dismiss as sentimental, utopian, and obsolete. But neither the caricatured Romantic nor Modernist roots of moral rights should be grounds for dismissing the doctrine altogether, any more than they provide a reason for completely abandoning copyright law. Instead, the moral rights doctrine should be narrow, recast in contemporary rhetoric and theory that focuses on creative participation, authorial voice, and personal dignity, rather than transcendence, genius, and preservation of cultural treasures.

Abandoning an object-based justification for moral rights would be consistent with the pervasive use of the internet and digital media in creative expression and the concomitant proliferation of image appropriation. In this vein, several scholars have advanced proposals for moral rights regimes that

²⁶³ I thank Professor Kwall for pointing out that the language of privilege generally skews the discussion.

favor a more widely-applicable right of attribution, requiring accurate designation or disclaimers²⁶⁴ and specifically utilizing digital tools such as hyperlinks to unaltered copies, citations, or other embedded information.²⁶⁵ Attribution rights conceived in these terms encompass goals traditionally served by the integrity right, that is, protecting authors from their public association with modified works that may be prejudicial to their dignity and reputation.²⁶⁶ A moral rights law with this type of structure could be circumscribed more by remedy than by a rigid taxonomy at the front end, thereby maintaining copyright's emphasis on users' rights and ensuring consistency with First Amendment principles.²⁶⁷

This Article favors abolishing a distinct right against destruction for those who create unique, tangible objects of art, except in rare, carefully-defined circumstances. Specifically, rather than cultural preservation's presumption of serving the public interest, the integrity right should depend on use²⁶⁸ of the work, as is already implied by modification. Thus, a privately-owned work could be freely discarded as unwanted—absented from the cultural marketplace without public notice—no matter how personally offended the artist might feel upon discovery. But if the act or fact of destruction was intentionally exploited in a public manner, the artist's moral rights could be invoked.²⁶⁹

Under this model, a living artist's integrity right would be implicated if her work was dismembered and sold in pieces—the act, rather than the work's material form or quality, evidencing a

²⁶⁴ See KWALL, *supra* note 7, at 149–55.

²⁶⁵ See Jacqueline D. Lipton, *Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 537, 562–77 (2011) (discussing attribution models proposed by Professor Kwall, as well as Professors Neil Weinstock Netanel and Jessica Litman).

²⁶⁶ KWALL, *supra* note 7, at 152–53 (proposing reform that requires link between attribution and integrity violations).

²⁶⁷ A deeper discussion of the relationship between moral rights and First Amendment law is beyond the scope of this Article; my analysis has assumed constitutional consistency.

²⁶⁸ I define “use” broadly to include reproduction; display by any means, including electronic transmission; commercial sale; exhibition, etc.

²⁶⁹ I am aware that an exploitation-based approach requires measuring moral rights violations through extrinsic means, contrary to the view that moral rights should presumptively encompass the subjective impact of destruction. See KWALL, *supra* note 7, at 156 (proposing that prohibition of destruction of works be retained for original versions of works of visual art on grounds that authorial dignity is necessarily harmed when an artist's work is destroyed).

societal use in which the artist retains a dignity interest.²⁷⁰ Although exploitive use, as opposed to other proxies of cultural value, will not necessarily protect what subsequent generations determine to be the “best” work of its time, the lesson of VARA is that cultural preservation policy should not be dispensed through copyright law, whether in real or symbolic terms.²⁷¹

Ultimately, neither the Picasso nor de Kooning situations prove to be sound models for crafting contemporary moral rights laws, given the case law predicated on an entirely different paradigm.²⁷² Rather, cultural norms in creative expression point to a more urgent battle, currently being waged in the copyright arena, over the line between theft and creative reuse of available copies, not unique objects.²⁷³ While VARA is irrelevant to these disputes, moral rights theory could be useful to copyright's appropriation wars. As copyright law responds to recycle and remix culture, attribution and integrity rights offer a conceptual means of addressing, rather than stifling, creative appropriation of available imagery.²⁷⁴ In this way, moral rights theory could

²⁷⁰ Similarly, de Kooning, had he objected to Rauschenberg's exhibited piece, could theoretically assert a moral rights violation, except that the *Erased de Kooning* situation was mitigated by proper attribution and an explanation of the change, by means of the title.

²⁷¹ The case of public art potentially challenges the “exploitive destruction” standard, given that destruction would, at least arguably, inherently constitute a public act. However, public art might be excepted as inherently noncommercial. Alternatively, the work's use value as art could comprehend the views of the community rather than exclusively the owner.

²⁷² As discussed, most VARA integrity cases have arisen against owners with commercial objectives related to property impinged upon, not against other artists or art collectors. *But cf.* *Lilley v. Stout*, 384 F. Supp. 2d 83, 84 (D.D.C. 2005). In *Lilley*, a photographer sued an artist for incorporating his work without attribution. The case was resolved in favor of the defendant because the court determined that the plaintiff's photographs were not produced for exhibition purposes only and therefore did not meet VARA's definition of a work of art. *Id.* at 88–89.

²⁷³ Unlike in the de Kooning example, where the original artist's notoriety was crucial to the new work, appropriation cases have involved a more successful artist using an image by a lesser-known artist. *E.g.*, *Blanch v. Koons*, 467 F.3d 244, 246–47 (2d Cir. 2006); *Rogers v. Koons*, 960 F.2d 301, 303–04 (2d Cir. 1992); *Cariou v. Prince*, 784 F. Supp. 2d 337, 343 (S.D.N.Y. 2011), *rev'd in part and vacated in part*, 714 F.3d 694 (2d Cir. 2013); *see also* Peter Jaszi, *Is There Such a Thing as Postmodern Copyright?*, 12 TUL. J. TECH. & INTELL. PROP. 105, 106 (2009) (discussing the impact of “postmodern cultural attitude” on copyright law).

²⁷⁴ A recent news article on *Cariou v. Prince* and its impact on artists and copyright law quoted Virginia Rutledge on society's “cultural attribution crisis,” supporting greater acknowledgment and credit to source artists. Randy Kennedy, *Apropos Appropriation*, N.Y. TIMES, Jan. 1, 2012, at A1.

help renovate copyright law by injecting authorial dignity as a mediating factor rather than an additional, autonomous right. Although the nexus of copyright law and creative production resists any perfect utilitarian “solution,” the only way for moral rights law to engage the conversation is by reconfiguring its object.

CONCLUSION

VARA is perceived as a moral rights statute whose province is exclusively visual artists, but its principal justification lies in preserving unique objects of fine art as a form of American cultural heritage. Rather than augmenting the authorship interests of artists and the cultural enrichment of the public, VARA’s dual purposes reified a conflict. Copyright law is not an effective means of enforcing a policy of art preservation, and channeling the latter through the former has profoundly limited the moral rights doctrine in the United States, in theory and in practice. Moral rights should be reconceived as rights of authorial dignity, rather than rights derived from the protection of unique objects. Consistent with this premise, an anti-destruction right of integrity for the creator of a unique object of art should not lie except in the rare instance of exploitive destruction by the owner. This would avoid compensating artists for cultural changes or disuse and thereby help legitimate and facilitate the development of other moral rights.